# UNITED STATES REPORTS

## VOLUME 428

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1975

JULY 1 THROUGH JULY 6, 1976

END OF TERM

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HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATUM

421 U. S. 67, line 4 from bottom: "36 Fed. Reg. 1586" should be "36 Fed. Reg. 15486."

350.973
U58
S96ca
v.428

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

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WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.

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OFFICERS OF THE COURT

EDWARD H. LEVI, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
ALFRED WONG, Marshal.*
BETTY J. CLOWERS, Acting Librarian.

*Mr. Wong, who had been Acting Marshal, see 424 U. S. III, was appointed Marshal effective July 1, *post*, p. 901.

## SUPREME COURT OF THE UNITED STATES

### ALLOTMENT OF JUSTICES

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

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(For next previous allotment, see 404 U. S., p. v.)

# TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1970 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.


| | Page |
|---|---|
| Alford *v.* Florida | 912 |
| Alvord *v.* Florida | 923 |
| Amalgamated. For labor union, see name of trade. | |
| Armstrong *v.* North Carolina | 902 |
| Attorney General of Massachusetts *v.* Baird | 132 |
| Attorney General of Missouri *v.* Planned Parenthood | 52 |
| Attorney General of Missouri; Planned Parenthood *v.* | 52 |
| Avery *v.* North Carolina | 904 |
| Baird; Bellotti *v.* | 132 |
| Baird; Hunerwadel *v.* | 132 |
| Beal *v.* Doe | 909 |
| Beal *v.* Franklin | 901 |
| Bellotti *v.* Baird | 132 |
| Bock *v.* North Carolina | 903 |
| Buffalo Forge Co. *v.* Steelworkers | 397 |
| Cantor *v.* Detroit Edison Co | 579 |
| Carey *v.* North Carolina | 904 |
| Carter *v.* North Carolina | 904 |
| Chief, D. C. Police Department; Geisha House, Inc. *v.* | 923 |
| City Manager of Hampton, Va.; Hogge *v.* | 913 |
| Cleveland Typographical Union; Plain Dealer Pub. Co. *v.* | 909 |
| Coe; Gerstein *v.* | 901 |
| Colorado Springs Amusements, Ltd. *v.* Rizzo | 913 |
| Commissioner of Social Services of Connecticut *v.* Roe | 908 |
| Crowder *v.* North Carolina | 903 |
| Cullinane; Geisha House, Inc. *v.* | 923 |
| Danforth *v.* Planned Parenthood of Central Missouri | 52 |
| Danforth; Planned Parenthood of Central Missouri *v.* | 52 |
| Davis *v.* Oklahoma | 907 |
| Deskins Branch Coal Co.; Slone *v.* | 901 |

| | Page |
|---|---|
| Detroit Edison Co.; Cantor *v.* | 579 |
| Detroit Edison Co.; Selden Drugs Co. *v.* | 579 |
| Dillard *v.* North Carolina | 903 |
| District Attorney of Philadelphia County; Franklin *v.* | 901 |
| Dixon *v.* United States | 923 |
| Doe; Beal *v.* | 909 |
| Doe; Poelker *v.* | 909 |
| Dull *v.* North Carolina | 904 |
| Employees Assn. of Kewanee; Hyster Co. *v.* | 910 |
| Fitzpatrick; Franklin *v.* | 901 |
| Florida; Alford *v.* | 912 |
| Florida; Alvord *v.* | 923 |
| Florida; Gardner *v.* | 908 |
| Florida; Hallman *v.* | 911 |
| Florida; Proffitt *v.* | 242 |
| Florida; Sawyer *v.* | 911 |
| Florida; Spenkelink *v.* | 911 |
| Florida; Sullivan *v.* | 911 |
| Food Handlers *v.* Valmac Industries, Inc. | 906 |
| Fowler *v.* North Carolina | 904 |
| Franklin; Beal *v.* | 901 |
| Franklin *v.* Fitzpatrick | 901 |
| Gardner *v.* Florida | 908 |
| Geisha House, Inc. *v.* Cullinane | 923 |
| Georgia; Gregg *v.* | 153 |
| Georgia; House *v.* | 910 |
| Georgia; Jarrell *v.* | 910 |
| Georgia; Machetti *v.* | 910 |
| Georgia; Mason *v.* | 910 |
| Georgia; McCorquodale *v.* | 910 |
| Georgia; Mitchell *v.* | 910 |
| Georgia; Moore *v.* | 910 |
| Georgia; Pulliam *v.* | 911 |
| Georgia; Ross *v.* | 910 |
| Georgia; Smith *v.* | 910 |
| Gerstein *v.* Coe | 901 |
| Goldswer *v.* New York | 908 |
| Gordon *v.* North Carolina | 903 |
| Green *v.* Oklahoma | 907 |
| Gregg *v.* Georgia | 153 |
| Griffin *v.* North Carolina | 904 |
| Hallman *v.* Florida | 911 |
| Harrill *v.* North Carolina | 904 |

| | Page |
|---|---|
| Hart *v.* United States | 923 |
| Havener; Meeks *v.* | 908 |
| Henderson *v.* North Carolina | 902 |
| Hogge *v.* Johnson | 913 |
| Honeycutt *v.* North Carolina | 903 |
| House *v.* Georgia | 910 |
| Hunerwadel *v.* Baird | 132 |
| Hyster Co. *v.* Employees Assn. of Kewanee | 910 |
| Janis; United States *v.* | 433 |
| Jarrell *v.* Georgia | 910 |
| Jarrette *v.* North Carolina | 903 |
| Johnson; Hogge *v.* | 913 |
| Jurek *v.* Texas | 262 |
| Justus *v.* Oklahoma | 907 |
| Karathanos; United States *v.* | 910 |
| King *v.* North Carolina | 903 |
| Labor Union. See name of trade. | |
| Lampkins *v.* North Carolina | 909 |
| LaVallee *v.* Mungo | 907 |
| Local. For labor union, see name of trade. | |
| Louisiana; Roberts *v.* | 325 |
| Louisiana; Selman *v.* | 906 |
| Louisiana; Washington *v.* | 906 |
| Louisiana; Watts *v.* | 906 |
| Lowery *v.* North Carolina | 902 |
| Lusty *v.* Oklahoma | 907 |
| Machetti *v.* Georgia | 910 |
| Maher *v.* Roe | 908 |
| Martin; Pennsylvania *v.* | 923 |
| Martinez-Fuerte; United States *v.* | 543 |
| Mason *v.* Georgia | 910 |
| Mayor of Philadelphia; Colorado Springs Amusements, Ltd. *v.* | 913 |
| Mayor of Philadelphia; Velvet Touch *v.* | 913 |
| Mayor of St. Louis *v.* Doe | 909 |
| McCorquodale *v.* Georgia | 910 |
| McLaughlin *v.* North Carolina | 903 |
| McZorn *v.* North Carolina | 904 |
| Meat Cutters *v.* Valmac Industries, Inc | 906 |
| Meeks *v.* Havener | 908 |
| Mine Workers; United States Steel Corp. *v.* | 910 |
| Mitchell *v.* Georgia | 910 |
| Mitchell *v.* North Carolina | 904 |
| Moore *v.* Georgia | 910 |

| | Page |
|---|---|
| Mungo; LaVallee *v.* | 907 |
| New York; Goldswer *v.* | 908 |
| Noell *v.* North Carolina | 902 |
| North Carolina; Armstrong *v.* | 902 |
| North Carolina; Avery *v.* | 904 |
| North Carolina; Bock *v.* | 903 |
| North Carolina; Carey *v.* | 904 |
| North Carolina; Carter *v.* | 904 |
| North Carolina; Crowder *v.* | 903 |
| North Carolina; Dillard *v.* | 903 |
| North Carolina; Dull *v.* | 904 |
| North Carolina; Fowler *v.* | 904 |
| North Carolina; Gordon *v.* | 903 |
| North Carolina; Griffin *v.* | 904 |
| North Carolina; Harrill *v.* | 904 |
| North Carolina; Henderson *v.* | 902 |
| North Carolina; Honeycutt *v.* | 903 |
| North Carolina; Jarrette *v.* | 903 |
| North Carolina; King *v.* | 903 |
| North Carolina; Lampkins *v.* | 909 |
| North Carolina; Lowery *v.* | 902 |
| North Carolina; McLaughlin *v.* | 903 |
| North Carolina; McZorn *v.* | 904 |
| North Carolina; Mitchell *v.* | 904 |
| North Carolina; Noell *v.* | 902 |
| North Carolina; Patterson *v.* | 904 |
| North Carolina; Robbins *v.* | 903 |
| North Carolina; Simmons *v.* | 903 |
| North Carolina; Sparks *v.* | 905 |
| North Carolina; Spaulding *v.* | 904 |
| North Carolina; Stegmann *v.* | 902 |
| North Carolina; Thompson *v.* | 908 |
| North Carolina; Vinson *v.* | 902 |
| North Carolina; Waddell *v.* | 904 |
| North Carolina; Ward *v.* | 903 |
| North Carolina; Wetmore *v.* | 905 |
| North Carolina; Woods *v.* | 903 |
| North Carolina; Woodson *v.* | 280 |
| North Carolina; Young *v.* | 903 |
| Oklahoma; Davis *v.* | 907 |
| Oklahoma; Green *v.* | 907 |
| Oklahoma; Justus *v.* | 907 |
| Oklahoma; Lusty *v.* | 907 |

Page
Oklahoma; Rowbotham *v*..... 907
Oklahoma; Williams *v*..... 907
Opperman; South Dakota *v*..... 364
Patterson *v*. North Carolina..... 904
Pennsylvania *v*. Martin..... 923
Plain Dealer Pub. Co. *v*. Cleveland Typographical Union.... 909
Planned Parenthood of Central Missouri *v*. Danforth..... 52
Planned Parenthood of Central Missouri; Danforth *v*..... 52
Poelker *v*. Doe..... 909
Powell; Stone *v*..... 465
Prescimone *v*. United States..... 910
Proffitt *v*. Florida..... 242
Pulliam *v*. Georgia..... 911
Rice; Wolff *v*..... 465
Rizzo; Colorado Springs Amusements, Ltd. *v*..... 913
Rizzo; Velvet Touch *v*..... 913
Robbins *v*. North Carolina..... 903
Roberts *v*. Louisiana..... 325
Roe; Maher *v*..... 908
Ross *v*. Georgia..... 910
Rowbotham *v*. Oklahoma..... 907
Sawyer *v*. Florida..... 911
Secretary of Labor *v*. Turner Elkhorn Mining Co..... 1
Secretary of Labor; Turner Elkhorn Mining Co. *v*..... 1
Secretary of Welfare of Pennsylvania *v*. Franklin..... 901
Secretary, Pennsylvania Dept. of Public Welfare *v*. Doe..... 909
Selden Drugs Co. *v*. Detroit Edison Co..... 579
Selman *v*. Louisiana..... 906
Sifuentes *v*. United States..... 543
Simmons *v*. North Carolina..... 903
Singleton *v*. Wulff..... 106
Slone *v*. Deskins Branch Coal Co..... 901
Smith *v*. Georgia..... 910
South Dakota *v*. Opperman..... 364
Sparks *v*. North Carolina..... 905
Spaulding *v*. North Carolina..... 904
Spenkelink *v*. Florida..... 911
Steelworkers; Buffalo Forge Co. *v*..... 397
Stegmann *v*. North Carolina..... 902
Stone *v*. Powell..... 465
Sullivan *v*. Florida..... 911
Superintendent of penal or correctional institution. See name or state title of superintendent.

| | Page |
|---|---|
| Texas; Jurek *v.* | 262 |
| Thompson *v.* North Carolina | 908 |
| Turner Elkhorn Mining Co. *v.* Usery | 1 |
| Turner Elkhorn Mining Co.; Usery *v.* | 1 |
| Typographical Union; Plain Dealer Pub. Co. | 909 |
| United. For labor union, see name of trade. | |
| United States; Dixon *v.* | 923 |
| United States; Hart *v.* | 923 |
| United States *v.* Janis | 433 |
| United States *v.* Karathanos | 910 |
| United States *v.* Martinez-Fuerte | 543 |
| United States; Prescimone *v.* | 910 |
| United States; Sifuentes *v.* | 543 |
| United States Steel Corp. *v.* Mine Workers | 910 |
| Usery *v.* Turner Elkhorn Mining Co. | 1 |
| Usery; Turner Elkhorn Mining Co. *v.* | 1 |
| Valmac Industries, Inc.; Food Handlers *v.* | 906 |
| Velvet Touch *v.* Rizzo | 913 |
| Vinson *v.* North Carolina | 902 |
| Waddell *v.* North Carolina | 904 |
| Ward *v.* North Carolina | 903 |
| Warden. See name of warden. | |
| Washington *v.* Louisiana | 906 |
| Watts *v.* Louisiana | 906 |
| Wetmore *v.* North Carolina | 905 |
| Williams *v.* Oklahoma | 907 |
| Wolff *v.* Rice | 465 |
| Woods *v.* North Carolina | 903 |
| Woodson *v.* North Carolina | 280 |
| Wulff; Singleton *v.* | 106 |
| Young *v.* North Carolina | 903 |

# TABLE OF CASES CITED


Page

Adams v. New York, 192 U. S. 585 482, 483
Adams v. Williams, 407 U. S. 143 518
Adickes v. Kress & Co., 398 U. S. 144 591
Agnello v. United States, 269 U. S. 20 382
Aguilar v. Texas, 378 U. S. 108 435, 473, 532
Ahern v. Murphy, 457 F. 2d 363 920
Aikens v. California, O. T. 1971, No. 68–5027 295
Albertson v. SACB, 382 U. S. 70 461
Alderman v. United States, 394 U. S. 165 447, 485, 488, 489, 499
Alford v. State, 307 So. 2d 433 255, 256, 259
Almeida-Sanchez v. United States, 413 U. S. 266 381, 382, 386, 388, 553, 555, 561, 564, 569, 570, 576, 577
Alvord v. State, 322 U. S. 533 255, 256, 259
Amstar Corp. v. Meat Cutters, 468 F. 2d 1372 404, 408
Anderson v. Richardson, 354 F. Supp. 363 455, 456
Andres v. United States, 333 U. S. 740 290, 296, 298
Andresen v. Maryland, 427 U. S. 463 568
Andrews v. Swartz, 156 U. S. 272 475
Appalachian Coals, Inc. v. United States, 288 U. S. 344 599
Armco Steel v. Mine Workers, 505 F. 2d 1129 404, 408
Armstead v. United States, 318 F. 2d 725 479

Page

Arnold v. State, 236 Ga. 534 202
Arnold Co. v. Carpenters, 417 U. S. 12 418, 423
Ashwander v. TVA, 297 U. S. 288 114, 124
Associated Contractors v. Operating Engineers, 519 F. 2d 269 404
Associated Contractors of Illinois v. Illinois Teamsters Conf., 454 F. 2d 1324 425
Atlantic Cleaners v. United States, 286 U. S. 427 635
Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502 28
Avco Corp. v. Aero Lodge 735, 390 U. S. 557 423
Baggett v. Bullitt, 377 U. S. 360 143
Baker v. Carr, 369 U. S. 186 114, 124
Bandini Petroleum Co. v. Superior Court, 284 U. S. 8 28
Barber v. Page, 390 U. S. 719 912
Barker v. Johnson, 484 F. 2d 941 371, 387
Bar L Ranch v. Phinney, 426 F. 2d 995 442
Barrows v. Jackson, 346 U. S. 249 112, 114–116, 124, 125, 127, 130
Beck v. Ohio, 379 U. S. 89 569
Bellotti v. Baird, 428 U. S. 132 90, 108
Bennett v. State, 507 P. 2d 1252 371
Bergemann v. Backer, 157 U. S. 655 475
Bivens v. Six Federal Agents, 403 U. S. 388 449, 489, 496

Page

Bob Jones Univ. v. Simon, 416 U. S. 725 441
Boehning v. Indiana Employees Assn., 423 U. S. 6 148
Bollman, Ex parte, 4 Cranch 75 475
Boyd v. United States, 116 U. S. 616 443, 447, 482, 483, 497, 524, 525
Boys Markets v. Retail Clerks, 398 U. S. 235 403, 404, 406–409, 411–419, 422–428, 430–432
Brady v. United States, 397 U. S. 742 349
Branch v. Texas, 408 U. S. 238 268, 274, 277, 278
Breed v. Jones, 421 U. S. 519 74
Brinegar v. United States, 338 U. S. 160 382
Broadrick v. Oklahoma, 413 U. S. 601 118, 123, 131
Brown v. Allen, 344 U. S. 443 476, 520, 521, 523, 525, 526, 528–530
Brown v. Illinois, 422 U. S. 590 489
Brown v. Merlo, 8 Cal. 3d 855 916
Brown v. State, 235 Ga. 644 164, 203
Brown v. United States, 411 U. S. 223 118, 488
Bruton v. United States, 391 U. S. 123 190
Buffalo Forge Co. v. Steelworkers, 428 U. S. 397 906
Bull v. United States, 295 U. S. 247 440
Bumper v. North Carolina, 391 U. S. 543 394
Burdeau v. McDowell, 256 U. S. 465 456
Bus Employees v. Missouri, 374 U. S. 74 403
Byars v. United States, 273 U. S. 28 455
Cabbler v. Commonwealth, 212 Va. 520 369, 371
Cabbler v. Superintendent, 528 F. 2d 1142 371, 391, 392

Page

Cady v. Dombrowski, 413 U. S. 433 367, 368, 370, 374–378, 382, 390–392, 394, 480, 518
California Bankers Assn. v. Shultz, 416 U. S. 21 380, 389
California Transport v. Trucking Unlimited, 404 U. S. 508 622
Calton v. Utah, 130 U. S. 83 298
Camara v. Municipal Court, 387 U. S. 523 367, 377, 378, 381–385, 394, 554, 555, 561, 562, 565, 569, 577
Cannon v. Oviatt, 419 U. S. 810 916
Cantor v. Detroit Edison Co., 428 U. S. 579 914
Carafas v. LaVallee, 391 U. S. 234 480, 481, 519
Cardwell v. Lewis, 417 U. S. 583 367, 368, 377, 379, 382, 386, 480, 481, 518, 561
Carey v. Sugar, 425 U. S. 73 147
Carpenter v. Wabash R. Co., 309 U. S. 23 16, 17
Carroll v. United States, 267 U. S. 132 367, 382, 386, 558, 561
Chaffin v. Stynchcombe, 412 U. S. 17 349
Chambers v. Maroney, 399 U. S. 42 367, 382, 386, 518
Chapman v. California, 386 U. S. 18 470, 509
Chenault v. State, 234 Ga. 216 203
Chicago & N. W. R. Co. v. Transportation Union, 402 U. S. 570 420
Chimel v. California, 395 U. S. 752 381, 382, 387
City. See name of city.
Coker v. State, 234 Ga. 555 224
Coley v. State, 231 Ga. 829 198, 205, 219, 224
Colonnade Catering v. United States, 397 U. S. 72 561

Page
Colorado River Cons. Dist. v. United States, 424 U. S. 800 147
Colorado Springs Amusements v. Rizzo, 428 U. S. 913 913, 923
Commissioner v. "Americans United" Inc., 416 U. S. 752 441
Commissioner v. Shapiro, 424 U. S. 614 441
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See also name of Commonwealth.
Commonwealth v. Dana, 43 Mass. 329 483
Commonwealth v. O'Neal, 399 N. E. 2d 676 181, 183, 236–238, 241, 352, 353
Compco Corp. v. Day-Brite Lighting, 376 U. S. 234 607
Compton v. United States, 334 F. 2d 212 442, 456
Construction Laborers v. Curry, 371 U. S. 542 428, 429
Continental Co. v. Union Carbide, 370 U. S. 690 593
Coolidge v. New Hampshire, 403 U. S. 443 367, 373, 387, 388
Cooper v. California, 386 U. S. 58 367, 369, 372, 373, 375, 377, 378, 382, 385, 390
Cotton v. United States, 371 F. 2d 385 372
Daniels v. Allen, 344 U. S. 443 476–478
Data Processing Serv. v. Camp, 397 U. S. 150 111–113, 123
Davis v. United States, 417 U. S. 333 477
Dean Milk v. Madison, 340 U. S. 349 612
Dennis v. United States, 341 U. S. 494 175
Desist v. United States, 394 U. S. 244 454, 489
Page
DeVeau v. Braisted, 363 U. S. 144 18
De Wells v. United States, 372 F. 2d 67 479
Dobbert v. State, 328 So. 2d 433 250
Doe v. Bolton, 410 U. S. 179 55, 56, 62, 63, 66, 69, 74, 111, 115–118, 128
Doe v. Commonwealth's Attorney, 425 U. S. 901 919
Doe v. Exon, Civ. Action No. CV75–L–146 (Neb.) 145
Doe v. Rampton, 366 F. Supp. 189 69, 74, 147
Doe v. Zimmerman, 405 F. Supp. 534 145
Dombrowski v. Cady, 319 F. Supp. 530 392
Dombrowski v. Pfister, 380 U. S. 479 101, 123, 513
Dorsey v. State, 236 Ga. 591 206
Douglas v. State, 328 So. 2d 18 250
Dowd Box Co. v. Courtney, 368 U. S. 502 423
Doyle v. Ohio, 426 U. S. 610 908
Dyke v. Taylor Implement Co., 391 U. S. 216 388
Eastern R. Conf. v. Noerr Motors, 365 U. S. 127 601, 602, 622–626
Eberheart v. State, 232 Ga. 247 164
Edelman v. Jordan, 415 U. S. 651 14, 617, 913, 914, 921
Ehlers v. Vinal, 382 F. 2d 58 442
Eisenstadt v. Baird, 405 U. S. 438 70, 115, 116, 126–128, 130
Eisner v. United States, 351 F. 2d 55 479
Elkins v. United States, 364 U. S. 206 443–446, 448, 452, 453, 461, 463, 464, 481–484, 492
England v. Medical Examiners, 375 U. S. 411 144, 150, 495, 526
Enochs v. Williams Packing Co., 370 U. S. 1 441

Page

Estelle v. Williams, 425 U. S. 501 516
Ex parte. See name of party.
Fay v. New York, 332 U. S. 261 324
Fay v. Noia, 372 U. S. 391 476–478, 492, 495, 513, 519–522, 526, 528, 533, 536
Ferguson v. Skrupa, 372 U. S. 726 15, 19, 627, 640
Fisher v. United States, 425 U. S. 391 380
Flast v. Cohen, 392 U. S. 83 112, 114, 115, 124
Fleming v. Rhodes, 331 U. S. 100 16
Flood v. Kuhn, 407 U. S. 258 617
Floyd v. State, 233 Ga. 280 202, 206
Foe v. Vanderhoof, 389 F. Supp. 947 145
Foster v. Commissioner, 391 F. 2d 727 442
Fowler v. North Carolina, 419 U. S. 963 352, 353
Francis v. Henderson, 425 U. S. 536 478, 513, 516, 519
Frank v. Mangum, 237 U. S. 309 476
Frank v. Maryland, 359 U. S. 360 482
Frisbie v. Collins, 342 U. S. 519 485
Fuller v. Alaska, 393 U. S. 80 489
Funkhouser v. Preston Co., 290 U. S. 163 16
Furman v. Georgia, 408 U. S. 238 162, 168, 169, 171–176, 179, 181–184, 186–188, 192, 196, 200, 203, 206, 207, 220–222, 227, 229, 231–233, 236–238, 240, 247, 251, 253, 254, 259–261, 268, 274, 276, 277, 279, 285–288, 292, 295, 297, 298, 300, 302–304, 306, 307, 309, 313, 315–317, 328, 331, 334, 337, 339, 345, 346, 349–354, 360–363

Page

Fusari v. Steinberg, 419 U. S. 379 921
Gaitan v. United States, 317 F. 2d 494 479
Gardner v. State, 313 So. 2d 675 255
Garner v. Teamsters, 346 U. S. 485 621
Gary Hobart Water Corp. v. NLRB, 511 F. 2d 284 404
Gary-Northwest Indiana Women's Serv. v. Bowen, 418 F. Supp. 9 145
Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494 193
Gateway Coal v. Mine Workers, 414 U. S. 368 405, 407, 408, 412–414, 418, 424, 425, 428, 430
Gault, In re, 387 U. S. 1 74
Geduldig v. Aiello, 417 U. S. 484 21
Georgia v. Evans, 316 U. S. 159 587, 589
Gerstein v. Pugh, 420 U. S. 103 485
Gibson v. Berryhill, 411 U. S. 564 919
Ginsberg v. New York, 390 U. S. 629 75
Godbee v. State, 224 So. 2d 441 371
Goldfarb v. Viriginia State Bar, 421 U. S. 773 593, 600, 604, 609, 615, 616, 623, 624, 638, 639
Gordon v. New York Stock Exchange, 422 U. S. 659 597, 629
Gore v. United States, 357 U. S. 386 176
Goss v. Lopez, 419 U. S. 565 74
Gouled v. United States, 255 U. S. 298 482, 483
Graham v. Locomotive Firemen, 338 U. S. 232 419
Greer v. Spock, 424 U. S. 828 519

Page

Gregg v. Georgia, 428 U. S. 153 247, 248, 252, 254, 256, 259, 261, 268, 270, 271, 274, 279, 285, 287, 288, 294, 303, 305, 306, 318, 331, 334, 336, 363, 907, 911, 912, 924
Griswold v. Connecticut, 381 U. S. 479 69, 70, 115–117, 128, 130
Grosso v. United States, 390 U. S. 62 461
Gulf Oil Corp. v. Copp Paving, 419 U. S. 186 635
Halliwell v. State, 323 So. 2d 557 253, 255, 256
Hallman v. State, 305 So. 2d 180 255
Hand v. United States, 441 F. 2d 529 456
Harris v. Nelson, 394 U. S. 286 519
Harris v. United States, 390 U. S. 234 374, 375, 377, 385, 386
Harrison v. NAACP, 360 U. S. 167 147
Hawkins v. United States, 358 U. S. 74 31
Helvering v. Taylor, 293 U. S. 507 441, 442
Hendrickson v. Sears, 495 F. 2d 513 151
Henry v. Bauder, 213 Kan. 751 916
Henry v. Mississippi, 379 U. S. 443 485
Henry v. State, 328 So. 2d 430 255
Herbert v. Commissioner, 377 F. 2d 65 442
Hicks v. Miranda, 422 U. S. 332 617, 913, 914, 917–920, 922
Hill v. United States, 368 U. S. 424 477
Hobart Water Corp. v. NLRB, 511 F. 2d 284 404
Hodgson v. Anderson, 378 F. Supp. 1008 65
Hogge v. Johnson, 526 F. 2d 833 915, 922

Page

Holden v. Hardy, 169 U. S. 366 114
Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 16
Hormel v. Helvering, 312 U. S. 552 120, 121
Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U. S. 738 606, 632, 635
Hudgens v. NLRB, 424 U. S. 507 519
Hyster Co. v. Independent Towing, 519 F. 2d 89 404
Inland Steel v. Mine Workers, 505 F. 2d 293 404, 408
In re. See name of party.
Investment Co. Institute v. Camp, 410 U. S. 617 113
Iowa v. Union Asphalt, 281 F. Supp. 391 455, 456
Irvine v. California, 347 U. S. 128 444, 446, 489
Island Creek Coal v. Mine Workers, 507 F. 2d 650 404, 408
Jackson v. Bishop, 404 F. 2d 571 173
Jackson v. Denno, 378 U. S. 368 190, 192
Jackson v. Guste, Civ. Action No. 74–2525 (ED La.) 145
Jackson v. Metropolitan Edison Co., 419 U. S. 345 594, 624, 625
Jarrell v. State, 234 Ga. 410 201, 203, 205, 206, 220, 224
Johnson v. Hassett, 217 N. W. 2d 771 916
Johnson v. Louisiana, 406 U. S. 356 312
Johnson v. State, 226 Ga. 511 219
Johnson v. United States, 333 U. S. 10 383, 532
Jones v. United States, 362 U. S. 257 488
Jurek v. Texas, 428 U. S. 262 227, 231, 287, 315, 352, 907
Katz v. United States, 389 U. S. 347 377, 381, 388

Page

Kaufman v. United States, 394 U. S. 217 479–481, 486, 490, 491, 495, 508, 517, 519, 520, 522, 528
Kemmler, In re, 136 U. S. 436 168, 170, 176, 178, 183, 308, 351
Killough v. United States, 114 U. S. App. D. C. 305 500, 501
Kisley v. Falls Church, 409 U. S. 907 915
Knoll Assoc. v. FTC, 397 F. 2d 530 455, 456
Kramer v. State, 230 Ga. 855 219
Kusper v. Pontikes, 414 U. S. 51 83, 147, 150
Laakonen v. Eighth Jud. Dist. Court, 538 P. 2d 574 916
Labor Board. See NLRB.
Labor Union. See name of trade.
Laing v. United States, 423 U. S. 161 441
Lake Carriers Assn. v. MacMullan, 406 U. S. 498 139, 147, 150
Lamadline v. State, 303 So. 2d 17 253
Lange, Ex parte, 18 Wall. 163 476
Lassoff v. Gray, 207 F. Supp. 843 455
Lear, Inc. v. Adkins, 395 U. S. 653 607
Leary v. United States, 395 U. S. 6 28
Lefkowitz v. Newsome, 420 U. S. 283 480, 518, 519
Lehman Bros. v. Schein, 416 U. S. 386 151
Lewis v. Reynolds, 284 U. S. 281 440
Lichter v. United States, 334 U. S. 742 16
Linder v. State, 132 Ga. App. 624 163
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 29, 31
Liner v. Jafco, Inc., 375 U. S. 301 428, 429
Lingo v. State, 226 Ga. 496 219
Linkletter v. Walker, 381 U. S. 618 486, 489
Longshoremen v. Marine Trade Assn., 389 U. S. 64 425
Louisiana ex rel. Francis v. Resweber, 329 U. S. 459 168, 170, 178, 288, 308, 324, 351
Louisville & N. R. Co. v. Mottley, 211 U. S. 149 509
Louisville & N. R. Co. v. Mottley, 219 U. S. 467 16, 17
Lowe v. Hopper, 400 F. Supp. 970 372
Lucas v. Structural Steel Co., 281 U. S. 264 440
Ludwig v. Massachusetts, 427 U. S. 618 518
Lustig v. United States, 338 U. S. 74 444, 446, 455
Mackey v. United States, 401 U. S. 667 521
Malinski v. New York, 324 U. S. 401 525, 578
Mancusi v. DeForte, 392 U. S. 364 479, 481, 519
Mandeville Farms v. American Sugar, 334 U. S. 219 635
Manistee Bank v. McGowan, 394 Mich. 655 916
Mapp v. Ohio, 367 U. S. 643 443, 446, 448, 451, 481, 484, 486, 509, 510, 512, 514, 535, 537, 538
Marchetti v. United States, 390 U. S. 39 461
Martin v. Hunter's Lessee, 1 Wheat. 304 494
Maxwell v. Bishop, 398 U. S. 262 356
Maynard v. Hill, 125 U. S. 190 69, 70
McCarthy v. Philadelphia Civ. Serv. Comm'n, 424 U. S. 645 920
McCorquodale v. State, 233 Ga. 369 201

Page

McDonald v. Board of Election, 394 U. S. 802 24
McDonald v. United States, 335 U. S. 451 382, 561, 565
McGautha v. California, 402 U. S. 183 168, 177, 193, 195, 196, 270, 288, 290–292, 297, 308, 311, 319, 321, 324, 347, 351, 356, 358
McGeehan v. Bunch, 88 N. M. 308 916
McGowan v. Maryland, 366 U. S. 420 114, 118, 127
McInnis v. Ogilvie, 394 U. S. 322 919
McKane v. Durston, 153 U. S. 684 316
McKeiver v. Pennsylvania, 403 U. S. 528 72
Messer v. State, 330 So. 2d 137 253
Metropolis Theatre Co. v. Chicago, 228 U. S. 61 29
Meyer v. Nebraska, 262 U. S. 390 73, 128
Michigan v. Tucker, 417 U. S. 433 454, 459
Miller v. United States, 357 U. S. 301 524
Minnesota v. National Tea Co., 309 U. S. 551 919
Miranda v. Arizona, 384 U. S. 436 923
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35 28, 30
Monongahela Power v. Electrical Workers, 484 F. 2d 1209 404
Monroe v. Pape, 365 U. S. 167 590
Moody v. Flowers, 387 U. S. 97 586
Moore v. Dempsey, 261 U. S. 86 476
Moore v. State, 233 Ga. 861 197, 205, 219, 223
Mourning v. Family Publications Serv., 411 U. S. 356 37
Mozzetti v. Superior Court, 4 Cal. 3d 699 371, 377, 379, 387, 388, 392, 395
Mullaney v. Wilbur, 421 U. S. 684 906
Munn v. Illinois, 94 U. S. 113 634
NAPA Pittsburgh, Inc. v. Chauffeurs, 502 F. 2d 321 404
Nathanson v. United States, 290 U. S. 41 435
NAACP v. Alabama, 357 U. S. 449 116, 125, 127
National Ind. Coal Operators Assn. v. Brennan, 372 F. Supp. 16 14
NLRB v. Natural Gas Utility Dist., 402 U. S. 600 620
New Orleans S. S. Assn. v. General Longshore Workers, 389 F. 2d 369 425
New York Central R. Co. v. Biane, 250 U. S. 596 21, 23
New York Central R. Co. v. White, 243 U. S. 188 15
Norman v. Baltimore & Ohio R. Co., 294 U. S. 240 16
North Carolina v. Alford, 400 U. S. 25 349
Northern Securities Co. v. United States, 193 U. S. 197 592, 606, 610, 614, 636
Novak v. Beto, 453 F. 2d 661 229
Nyberg v. Virginia, 495 F. 2d 1342 111
O'Connor v. Donaldson, 422 U. S. 563 541
Olmstead v. United States, 277 U. S. 438 484, 524, 525
Olsen v. Smith, 195 U. S. 332 611, 615, 616
Oregon v. Hass, 420 U. S. 714 396
Otter Tail Power v. United States, 410 U. S. 366 596
Papachristou v. Jacksonville, 405 U. S. 156 471, 530, 531
Parker v. Brown, 317 U. S. 341 581, 582, 585–587, 589–595, 601–604, 608, 609, 613–618, 620–626, 631, 637
Parker v. North Carolina, 397 U. S. 742 349

Page

Pass v. State, 227 Ga. 730 219
Pennsylvania ex rel. Sullivan v. Ashe, 302 U. S. 51 189, 304, 321
People v. Anderson, 6 Cal. 3d 628 181, 183, 237, 333, 352
People v. Cahan, 44 Cal. 2d 434 448
People v. Clark, 32 Ill. App. 3d 898 371
People v. Cooper, 234 Cal. App. 2d 587 374
People v. Defore, 242 N. Y. 13 489, 502
People v. McMurty, 64 Misc. 2d 63 448
People v. Mitchell, 39 N. Y. 2d 173 502
People v. Sullivan, 29 N. Y. 2d 69 369–371
People v. Trusty, 183 Colo. 291 371
People v. Willis, 46 Mich. App. 436 370, 371
People ex rel. Rice v. Cunningham, 61 Ill. 2d 353 353
Pettibone v. Nichols, 203 U. S. 192 475
Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603 15
Pierce v. Society of Sisters, 268 U. S. 510 73, 118, 129
Pierson v. Ray, 386 U. S. 547 541
Pilot Freight Carriers v. Teamsters, 497 F. 2d 311 404
Pizzarello v. United States, 408 F. 2d 579 442, 455–457
Plain Dealer Pub. Co. v. Cleveland Typographical Union, 520 F. 2d 1220 404
Planned Parenthood Assn. v. Fitzpatrick, 401 F. Supp. 554 145
Planned Parenthood of Missouri v. Danforth, 428 U. S. 52 108, 115, 128, 143, 145, 147, 149, 151, 901
Planned Parenthood of Missouri v. Danforth, 392 F. Supp. 1362 141

Page

Plymouth Sedan v. Pennsylvania, 380 U. S. 693 447, 458, 463
Poe v. Gerstein, 517 F. 2d 787 69, 74, 145
Port Authority Comm. v. Port of N. Y. Auth., 387 F. 2d 259 618
Posadas v. National City Bank, 296 U. S. 497 598
Powell v. Alabama, 287 U. S. 45 187
Powell v. Texas, 392 U. S. 514 176, 184
Powell v. Zuckert, 125 U. S. App. D. C. 55 455, 456
Preston v. United States, 376 U. S. 364 375, 382, 388
Primes v. Tyler, 43 Ohio St. 2d 195 916
Prince v. Massachusetts, 321 U. S. 158 72, 75
Proffitt v. Florida, 428 U. S. 242 201, 202, 227, 231, 270, 272, 287, 907
Psaty v. United States, 442 F. 2d 1154 442
Rahrer, In re, 140 U. S. 545 475
Railroad Comm'n v. Pullman Co., 312 U. S. 496 139, 143, 144, 147
Railroad Retirement Bd. v. Alton R. Co., 295 U. S. 330 19
Railroad Trainmen v. Chicago, R. & I. R. Co., 353 U. S. 30 419
Railroad Trainmen v. Howard, 343 U. S. 768 419
Rea v. United States, 350 U. S. 214 483
Reid v. Covert, 354 U. S. 1 187
Richardson v. Belcher, 404 U. S. 78 40, 44
Ringgold v. Collingswood, 426 U. S. 901 919
Rizzo v. Goode, 423 U. S. 362 458, 513
Roberts v. Louisiana, 428 U. S. 325 200, 233, 237, 239, 261, 271, 278, 279, 301, 307, 906, 907

Page

Robinson v. California, 370 U. S. 660 172–174, 176, 287, 288, 308, 324, 339
Rochin v. California, 342 U. S. 165 444, 446, 518
Rodgers v. Danforth, 410 U. S. 949 56
Roe v. Wade, 410 U. S. 113 55, 56, 60, 61, 63, 64 66, 69, 71, 74, 76, 80, 89, 90, 92–95, 99–102, 111, 117, 126, 130, 137
Rogers v. United States, 97 F. 2d 691 455
Ross v. State, 233 Ga. 361 204
Rubenstein v. Cherry Hill, 417 U. S. 963 915
St. Paul v. Myles, 298 Minn. 298 371
San Diego Unions v. Garmon, 359 U. S. 236 621
Santobello v. New York, 404 U. S. 257 349
Sawyer v. State, 313 So. 2d 680 250, 255, 257
Scheuer v. Rhodes, 416 U. S. 232 541
Schlesinger v. Reservists to Stop the War, 418 U. S. 208 124
Schneckloth v. Bustamonte, 412 U. S. 218 480, 481, 491, 514, 518
Schwegmann Bros. v. Calvert Corp., 341 U. S. 384 593, 606, 608, 609, 614, 638
Sears, Roebuck & Co. v. Stiffel Co., 376 U. S. 225 607
See v. Seattle, 387 U. S. 541 367
Shelley v. Kraemer, 334 U. S. 1 125
Sidle v. Majors, 536 F. 2d 1156 915, 918, 919
Siebold, Ex parte, 100 U. S. 371 476
Silver v. New York Stock Exchange, 373 U. S. 341 596
Silver v. Silver, 280 U. S. 117 915
Silverthorne Lumber v. United States, 251 U. S. 385 474, 483

Page

Simon v. Eastern Ky. Welfare Rights Org., 426 U. S. 26 113, 123, 124, 513
Sims v. State, 203 Ga. 668 163
Sinclair Rfg. v. Atkinson, 370 U. S. 195 406, 409, 415, 423, 426, 432
Singleton v. Wulff, 428 U. S. 106 62, 901
Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535 90
Slater v. State, 316 So. 2d 539 253
Smith v. Keator, 419 U. S. 1043 914
Smith v. State, 236 Ga. 12 205
Smith v. State, No. 49,809 (Tex. Ct. Crim. App.) 270, 273
Songer v. State, 322 So. 2d 481 252, 253
South Dakota v. Opperman, 428 U. S. 364 568
Southern Pacific Co. v. Arizona, 325 U. S. 761 612
Spannaus v. Hodgson, 420 U. S. 903 65
Spencer v. Texas, 385 U. S. 554 191, 356, 357
Sperling v. Fitzpatrick, 426 F. 2d 1161 456
Spinelli v. United States, 393 U. S. 410 435–437, 473
Spinkellink v. State, 313 So. 2d 666 250, 255
Stanford v. Texas, 379 U. S. 476 482
Stanley v. Illinois, 405 U. S. 645 22, 90, 93
State. See also name of State.
State v. Achter, 512 S. W. 2d 894 371, 387
State v. All, 17 N. C. App. 284 370, 371, 387
State v. Brown, 233 N. C. 202 477
State v. Brumfield, 319 So. 2d 402 335
State v. Cooley, 260 La. 768 330
State v. Criscola, 21 Utah 2d 272 371

Page

State v. Dixon, 283 So. 2d 1 201, 251, 252, 255, 256, 258
State v. Douglas, 278 So. 2d 485 335, 337
State v. Evans, 317 So. 2d 168 335
State v. Hill, 297 So. 2d 660 334, 347
State v. Koome, 84 Wash. 2d 901 74, 145
State v. Marks, 263 La. 355 337
State v. McAllister, 263 La. 298 337
State v. McDougal, 68 Wis. 2d 399 388, 392
State v. Montague, 73 Wash. 2d 381 371
State v. Poland, 263 La. 269 337
State v. Rice, 188 Neb. 728 533
State v. Selman, 300 So. 2d 467 334, 347
State v. Sinclair, 263 La. 377 337
State v. Singleton, 263 La. 269 337
State v. Spivey, 151 N. C. 676 332
State v. Square, 263 La. 291 337
State v. Strong, 263 La. 298 337
State v. Tully, 166 Conn. 126 371, 387
State v. Vestal, 283 N. C. 249 332
State v. Waddell, 282 N. C. 431 285, 300, 306
State v. Wallen, 185 Neb. 44 370, 371
State v. Williams, 263 La. 284 337
Steelworkers v. American Mfg., 363 U. S. 564 405, 427
Steelworkers v. Enterprise Corp., 363 U. S. 593 405, 427, 431
Steelworkers v. Warrior & Gulf Co., 363 U. S. 574 405, 424, 427
Stokely-Van Camp, Inc. v. Thacker, 394 F. Supp. 715 426
Stone v. Powell, 428 U. S. 465 460, 568, 907

Page

Stoner v. California, 376 U. S. 483 381, 393
Suarez v. Commissioner, 58 T. C. 792 442, 455–457
Sullivan v. State, 303 So. 2d 632 253
Sunal v. Large, 332 U. S. 174 477
Sunshine Coal v. Adkins, 310 U. S. 381 639
Super Tire Engineering v. McCorkle, 416 U. S. 115 403
Swan v. State, 322 So. 2d 485 252, 253
Taylor v. State, 294 So. 2d 648 253
Teamsters v. Lucas Flour Co., 369 U. S. 95 407, 408
Teamsters v. Yellow Transit, 370 U. S. 711 415
Tedder v. State, 322 So. 2d 908 249, 253, 255, 256
Tehan v. Shott, 382 U. S. 406 443, 486
Terry v. Ohio, 392 U. S. 1 377, 378, 382, 385, 391, 393, 394, 443, 484, 486, 531, 555, 560, 567, 569, 573
Texas v. White, 423 U. S. 67 567
Textile Workers v. Lincoln Mills, 353 U. S. 448 415, 418, 420–422, 424
Thompson v. Hagan, 96 Idaho 19 916
Thompson v. State, 328 So. 2d 1 249, 250, 253
Thornton v. United States, 125 U. S. App. D. C. 114 479
Tinker v. Des Moines School Dist., 393 U. S. 503 74
Tot v. United States, 319 U. S. 463 28, 31
Townsend v. Sain, 372 U. S. 293 494, 518, 520, 521, 528
Trop v. Dulles, 356 U. S. 86 168, 171–174, 176, 178, 182, 190, 227, 230, 240, 288, 301, 304, 308, 324, 336, 351, 352, 363
Turner v. Memphis, 369 U. S. 350 121

Page

Union Pacific R. Co. v. United States, 313 U. S. 450 593
United States v. American Bldg. Maint. Industries, 422 U. S. 271 635
United States v. Baca, 368 F. Supp. 398 546, 551, 553
United States v. Biswell, 406 U. S. 311 561
United States v. Blank, 261 F. Supp. 180 455, 456
United States v. Borden Co., 308 U. S. 188 608
United States v. Bowen, 500 F. 2d 960 547
United States v. Boyd, 436 F. 2d 1203 372
United States v. Brignoni-Ponce, 422 U. S. 873 377, 378, 394, 548, 551, 552, 554–559, 563, 564, 567, 568, 570, 571, 574, 575
United States v. Calandra, 414 U. S. 338 443, 446, 447, 454, 457, 459, 460, 485–488, 498, 499, 509, 510
United States v. Carolene Products Co., 304 U. S. 144 24, 44
United States v. E. C. Knight Co., 156 U. S. 1 636
United States v. Esquer-Rivera, 500 F. 2d 313 547
United States v. Fay, 183 F. Supp. 222 478
United States v. Frankfort Distilleries, 324 U. S. 293 635
United States v. Fuller, 277 F. Supp. 97 372, 387
United States v. Gainey, 380 U. S. 63 28, 34
United States v. Gravitt, 484 F. 2d 375 371
United States v. Jackson, 390 U. S. 570 192
United States v. Janis, 428 U. S. 433 492, 498, 499, 502, 568
United States v. Jeffers, 342 U. S. 48 382
United States v. Jenkins, 281 F. 2d 193 479

Page

United States v. Juarez-Rodriguez, 498 F. 2d 7 547
United States v. Kelehar, 470 F. 2d 176 369
United States v. Lawson, 487 F. 2d 468 375, 377, 388
United States v. Lipscomb, 435 F. 2d 795 371
United States v. Mapp, 476 F. 2d 67 382
United States v. Martinez-Fuerte, 428 U. S. 543 378, 379, 383, 387, 503
United States v. Matlock, 415 U. S. 164 393
United States v. Miller, 425 U. S. 435 568
United States v. Mitchell, 458 F. 2d 960 369, 371, 387
United States v. Munsingwear, 340 U. S. 36 37
United States v. National Assn. of Securities Dealers, 422 U. S. 694 598
United States v. Ortiz, 422 U. S. 891 378, 379, 382, 388, 545, 546, 554, 555, 558, 561, 567, 568, 570, 573, 576, 577
United States v. Peltier, 422 U. S. 531 17, 446, 454, 457, 459, 460, 485, 486, 510
United States v. Pennington, 441 F. 2d 249 371, 372
United States v. Philadelphia Nat. Bank, 374 U. S. 321 629
United States v. Raines, 362 U. S. 17 123
United States v. Re, 372 F. 2d 641 479
United States v. Rexach, 482 F. 2d 10 442
United States v. Richardson, 418 U. S. 166 124, 125
United States v. Rock Royal Co-op, 307 U. S. 533 601, 602
United States v. Santana, 427 U. S. 38 568
United States v. Santibanez, 517 F. 2d 922 550
United States v. Schipani, 435 F. 2d 26 456

Page
United States v. Smith, 340 F. Supp. 1023 372
United States v. Spitalieri, 391 F. Supp. 167 372, 375
United States v. Stonehill, 274 F. Supp. 420 455, 456
United States v. Sutton, 321 F. 2d 221 479
United States v. Underwriters Assn., 322 U. S. 533 608, 635
United States v. U. S. District Court, 407 U. S. 297 381, 383, 566, 577
United States v. Watson, 423 U. S. 411 383, 565, 568
U. S. ex rel. See name of real party in interest.
United States Steel v. Mine Workers, 519 F. 2d 1236 404
Urie v. Thompson, 337 U. S. 163 21
Valmac Industries v. Food Handlers, 519 F. 2d 263 404
Van Lare v. Hurley, 421 U. S. 338 37
Virginian R. Co. v. System Fed., 300 U. S. 515 419
Virginia Pharmacy Bd. v. Virginia Council, 425 U. S. 748 617, 901
Vlandis v. Kline, 412 U. S. 441 22
Walder v. United States, 347 U. S. 62 485, 488
Warden v. Hayden, 387 U. S. 294 382, 481, 483, 519
Warrix v. State, 50 Wis. 2d 368 369, 371
Warth v. Seldin, 422 U. S. 490 123–125, 127, 513
Watkins, Ex parte, 3 Pet. 193 475
Watson v. State, 229 Ga. 787 219
Weeks v. United States, 232 U. S. 383 443, 444, 446, 482–484, 497, 525, 538
Weems v. United States, 217 U. S. 349 171, 173, 174, 288, 352, 363
Page
Weinberger v. Salfi, 422 U. S. 749 24
Welch v. Helvering, 290 U. S. 111 440
Welch v. Henry, 305 U. S. 134 16
Whiteley v. Warden, 401 U. S. 560 473, 481, 518, 532, 533
Wilkerson v. Utah, 99 U. S. 130 168, 170, 173, 178, 183, 308, 324, 351
William E. Arnold Co. v. Carpenters, 417 U. S. 12 418, 423
Williams v. New York, 337 U. S. 241 183, 189, 297, 304, 322, 333
Williams v. Oklahoma, 358 U. S. 576 189
Williams v. United States, 307 F. 2d 366 479
Williamson v. Lee Optical Co., 348 U. S. 483 15, 19, 44
Wilson v. State, 239 Md. 245 193
Winston v. United States, 172 U. S. 303 290, 296, 298, 301
Wisconsin v. Constantineau, 400 U. S. 433 83, 143
Wisconsin v. Yoder, 406 U. S. 205 73
Witherspoon v. Illinois, 391 U. S. 510 168, 190, 252, 295, 301, 351
Wolf v. Colorado, 338 U. S. 25 444, 446, 483, 484
Wolfe v. Schroering, 388 F. Supp. 631 65, 69, 74, 77, 79, 98, 145
Wong Sun v. United States, 371 U. S. 471 381, 474, 488, 489
Wood, In re, 140 U. S. 278 475
Wood v. Strickland, 420 U. S. 308 541
Woodson v. North Carolina, 428 U. S. 280 176, 190, 200, 271, 332, 334–336, 349, 901, 905–908

| | Page |
|---|---|
| Wright v. Jackson, 506 F. 2d 900 | 920 |
| Wymann v. James, 400 U. S. 309 | 370 |
| Younger v. Harris, 401 U. S. 37 | 513 |
| Zwickler v. Koota, 389 U. S. 241 | 147, 530 |

# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1975

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## USERY, SECRETARY OF LABOR, ET AL. *v.* TURNER ELKHORN MINING CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

No. 74–1302. Argued December 2, 1975—Decided July 1, 1976*

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, provides benefits to coal miners suffering from "black lung disease" (pneumoconiosis), and to survivors of miners who have died from, or while totally disabled by, the disease. Financial responsibility for payment of the benefits is divided into three parts: (1) Under Part B of Title IV claims filed between December 30, 1969 (enactment date), and June 30, 1973, are adjudicated by the Secretary of Health, Education, and Welfare (HEW), and paid by the United States; (2) under § 415 of Part B claims filed during the transition period between the Federal Government benefit provision under Part B, *supra*, and the state plan or operator benefit provision under Part C, *infra* (July 1 to December 31, 1973), are adjudicated by the Secretary of Labor and paid by the United States. Federal payments to these claimants terminate on December 31, 1973, and the claimant's coal mine employer assumes responsibility to make continuing payments as if Part C and

*Together with No. 74–1316, *Turner Elkhorn Mining Co. et al.* v. *Usery, Secretary of Labor, et al.*, also on appeal from the same court.

§ 422 had applied (see (3), *infra*); and (3) under Part C, claims filed after December 31, 1973, are to be processed under an approved state workmen's compensation law and, absent such an approved plan, claims are to be filed with and adjudicated by the Secretary of Labor, and paid by the mine operators, § 422. Under that provision an operator, who is entitled to a hearing in connection with these claims, is liable for benefits with respect to death or total disability due to pneumoconiosis arising out of employment in a mine for which the operator is responsible, the operator's liability covering the period from January 1, 1974, to December 30, 1981. Payments for benefits under Part C are to the same category of persons (a miner or certain survivors) and in the same amounts as under Part B. A miner is "totally disabled" and thus entitled to compensation "when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time," § 402 (f). The Act prescribes several "presumptions" for use in determining compensable disability: Under § 411 (c)(3) a miner shown by X-ray or other clinical evidence to be afflicted with complicated pneumoconiosis (the disease's incurable and final stage) is "irrebuttably presumed" to be totally disabled due to the disease; if such a miner has died, it is irrebuttably presumed that he was totally disabled by the disease at the time of death, and that his death was due thereto. There are three rebuttable presumptions (none of which may, under § 413 (b), be defeated solely by a chest X-ray): (1) if a miner with 10 or more years' mine employment contracts pneumoconiosis, it is presumed that the disease arose out of such employment, § 411 (c)(1); (2) if he died from a respiratory disease it is presumed that death was due to pneumoconiosis, § 411 (c)(2); (3) if a miner, or the survivor of a miner, with 15 or more years' underground coal mine employment is able, despite the absence of clinical evidence of complicated pneumoconiosis, to demonstrate a totally disabling respiratory or pulmonary impairment, it is presumed that the total disability is attributable to the disease, that the miner was totally disabled thereby when he died, and that death was due to the disease, § 411 (c)(4), and the final sentence of that provision specifies that "[t]he Secretary may rebut [this latter] presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impair-

ment did not arise out of, or in connection with, employment in a coal mine." A number of operators brought this suit claiming that the Act is unconstitutional under the Due Process Clause of the Fifth Amendment insofar as it requires benefit payments with respect to miners who left mine employment before the Act's effective date; that the statutory definitions, presumptions, and limitations on rebuttal evidence unconstitutionally impair the operator's ability to defend against benefit claims; and that certain regulations promulgated by the Secretary of Labor regarding the apportionment of liability for benefits among operators are inconsistent with the Act and unconstitutional. The District Court upheld each challenged provision as constitutional, with two exceptions: (1) It held § 411 (c)(3) unconstitutional as an unreasonable and arbitrary legislative finding of total disability "in terms other than those provided by the Act as standards for total disability." (2) Reading the evidence limitation on rebuttal in § 411 (c)(4) to apply to an operator's defense in a § 415 transition-period case, the court held the limitation arbitrary and unreasonable in not permitting a rebuttal showing that the case of pneumoconiosis afflicting the miner was not disabling. And, taking the provision to mean that an operator may defend against liability only on the ground that pneumoconiosis did not arise out of employment in *any* coal mine (rather than in a coal mine for which the operator was responsible) the District Court found the provision an arbitrary and unreasonable limitation on rebuttal evidence relevant and proper under § 422 (c). The court enjoined the Secretary of Labor from seeking to apply the two provisions thus found unconstitutional. *Held:*

1. This Court's summary affirmance in *National Independent Coal Operators Assn.* v. *Brennan,* 419 U. S. 955, did not foreclose the District Court's rulings regarding §§ 411 (c)(3) and (4), which were not before the Court on that appeal. P. 14.

2. The challenged provisions do not violate the Due Process Clause of the Fifth Amendment. Pp. 14–38.

(a) The Clause does not bar requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines, even if the former employee terminated his employment in its mines before the Act was passed. Retrospective application of the Act in this manner can be justified as serving to spread costs in a rational manner—by allocating to the operator an actual cost of its business, whose avoidance might be thought to have enlarged

the operator's profits. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, distinguished. Pp. 14–20, 24–27.

(b) Though the operators contend that the § 402 (f) definition of total disability is arbitrary because former miners who might be employable in other lines of work are compensated, a miner disabled under § 402 (f)'s standards has suffered health impairment, and has been rendered unable to perform the work to which he has adapted himself, factors which afford a rational basis for compensation. P. 21.

(c) The effect of § 411 (c)(3)'s "irrebuttable presumption" of total disability—to establish entitlement where a miner is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment—is clearly permissible, and the provision, being part of a statute regulating purely economic matters, is not rendered invalid by Congress' choice of statutory language. Pp. 22–24.

(d) The presumptions in §§ 411 (c)(1) and (2) are valid because there is a "rational connection between the fact proved and the ultimate fact presumed," *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43. In view of the medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with 10 years' mine employment, it was not "purely arbitrary" for Congress to select the 10-year figure as a reference point for the presumptions; nor are the 10-year presumptions arbitrary because they fail to account for varying degrees of exposure. Pp. 27–30.

(e) The 15-year durational basis of the presumption in § 411 (c)(4) is likewise unassailable, particularly in light of medical testimony in the Senate Hearings on the 1969 Act. Pp. 30–31.

(f) Congress had evidence showing doubts about the reliability of negative X-ray evidence as indicating the absence of the disease. That through its adoption of § 413 (b) Congress ultimately resolved those doubts in the disabled miner's favor does not render that provision arbitrary. Pp. 31–34.

(g) The District Court improperly invalidated the limitation on evidence contained in § 411 (c)(4) because the limitation is inapplicable to operators and applies only to the Secretary of HEW. Thus the Act does not restrict the evidence with which an operator may rebut the § 411 (c)(4) presumption. Pp. 34–37.

385 F. Supp. 424, affirmed in part; reversed in part; vacated and remanded in part.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and BLACKMUN, JJ., joined; in all but Part IV of which POWELL, J., joined; and in all but Part V–D of which STEWART and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment in part, *post*, p. 38. STEWART, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, J., joined, *post*, p. 45. BURGER, C. J., concurred in the judgment. STEVENS, J., took no part in the consideration or decision of the cases.

*Deputy Solicitor General Wallace* argued the cause for appellants in No. 74–1302 and for appellees in No. 74–1316. With him on the brief were *Solicitor General Bork, Assistant Attorney General Lee, Ronald R. Glancz,* and *Laurie Streeter.*

*R. R. McMahan* argued the cause for appellees in No. 74–1302 and for appellants in No. 74–1316. With him on the briefs was *James M. Graves.*†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Twenty-two coal mine operators (Operators) brought this suit to test the constitutionality of certain aspects of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U. S. C. § 901 *et seq.* (1970 ed. and Supp. IV). The Operators, potentially liable under the amended Act to compensate certain miners, former miners, and their survivors for death or total disability due to pneumoconiosis arising out of employment in coal mines, sought declaratory and injunctive relief against the Secretary of Labor and the

†*Joseph A. Yablonski* and *Willard P. Owens* filed a brief for the United Mine Workers of America as *amicus curiae* urging reversal in No. 74–1302 and affirmance in No. 74–1316.

*Guy Farmer* and *William A. Gershuny* filed a brief for the Bituminous Coal Operators' Assn., Inc., as *amicus curiae.*

Secretary of Health, Education, and Welfare, who are responsible for the administration of the Act and the promulgation of regulations under the Act.

On cross-motions for summary judgment, a three-judge District Court for the Eastern District of Kentucky, convened pursuant to 28 U. S. C. §§ 2282 and 2284, found the amended Act constitutional on its face, except in regard to two provisions concerning the determination of a miner's total disability due to pneumoconiosis. The court enjoined the Secretary of Labor from further application of those two provisions. 385 F. Supp. 424 (1974). After granting a stay of the three-judge court's order, 421 U. S. 944 (1975), we noted probable jurisdiction of the cross-appeals. 421 U. S. 1010 (1975). We conclude that the amended Act, as interpreted, is constitutionally sound against the Operators' challenges.

## I

Coal workers' pneumoconiosis—black lung disease—affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment.[1] The disease is caused by long-term inhalation of coal dust.[2] Coal workers' pneumoconiosis (here-

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[1] The House and Senate Reports on the 1969 Act placed the number of afflicted active and retired miners at 100,000. S. Rep. No. 91–411, p. 6 (1969), and H. R. Rep. No. 91–563, p. 17 (1969). The Senate Report, *supra*, at 7, specified that, on the basis of X-ray examination, the disease rate was 10% for then-active coal miners, and 20% for inactive coal miners. Other estimates have run significantly higher. See, *e. g.*, Hearings on S. 355, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., pt. 2, p. 641 (1969).

[2] Coal workers' pneumoconiosis is a distinct clinical entity, and is not the only type of pneumoconiosis. The remarks of the Surgeon General, reproduced in H. R. Rep. No. 91–563, *supra*, at 15, indi-

after pneumoconiosis) is generally diagnosed on the basis of X-ray opacities indicating nodular lesions on the lungs of a patient with a long history of coal dust exposure. As the Surgeon General has stated, however, post-mortem examination data have indicated a greater prevalence of the disease than X-ray diagnosis reveals.

According to the Surgeon General, pneumoconiosis is customarily classified as "simple" or "complicated."[3] Simple pneumoconiosis, ordinarily identified by X-ray opacities of a limited extent, is generally regarded by physicians as seldom productive of significant respiratory impairment. Complicated pneumoconiosis, generally far more serious, involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually[4] produces significant pulmonary impairment and marked respiratory disability. This disability limits the victim's physical capabilities, may induce death by cardiac failure, and may contribute to other causes of death.[5]

Removing the miner from the source of coal dust has so far proved the only effective means of preventing the contraction of pneumoconiosis, and once contracted the disease is irreversible in both its simple and complicated stages. No therapy has been developed. Finally, because the disease is progressive,[6] at least in its com-

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cate that the pathological condition of pneumoconiosis may also be caused by inhalation of other dusty materials, such as cotton fibers or silica.

[3] S. Rep. No. 91–411, *supra*, at 7–8; H. R. Rep. No. 91–563, *supra*, at 15–16.

[4] There was evidence before Congress that the complicated stage of the disease is sometimes exhibited with "mild pulmonary function changes and little or no disability." Hearings on S. 355, *supra*, n. 1, at 858.

[5] *Ibid.*

[6] *Ibid.*

plicated stage, its symptoms may become apparent only after a miner has left the coal mines.

In order to curb the incidence of pneumoconiosis, Congress provided in Title II of the Federal Coal Mine Health and Safety Act of 1969, § 201 *et seq.*, 30 U. S. C. § 841 *et seq.*, for limits on the amount of dust to be permitted in the ambient air of coal mines. Additionally, in view of the then-established prevalence of irreversible pneumoconiosis among miners, and the insufficiency of state compensation programs, Congress passed Title IV of the 1969 Act, § 401 *et seq.*, 30 U. S. C. § 901 *et seq.*, to provide benefits to afflicted miners and their survivors. These benefit provisions were subsequently broadened by the Black Lung Benefits Act of 1972. 30 U. S. C. § 901 *et seq.* (1970 ed., Supp. IV).

As amended, the Act divides the financial responsibility for payment of benefits into three parts. Under Part B of Title IV, §§ 411–414, 30 U. S. C. §§ 921–924 (1970 ed. and Supp. IV), claims filed between December 30, 1969, the date of enactment, and June 30, 1973, are adjudicated by the Secretary of Health, Education, and Welfare and paid by the United States.[7]

Under Part C of Title IV, §§ 421–431, 30 U. S. C. §§ 931–941 (1970 ed. and Supp. IV), claims filed after December 31, 1973, are to be processed under an applicable state workmen's compensation law approved by the Secretary of Labor under the standards set forth in § 421, 30 U. S. C. § 931 (1970 ed. and Supp. IV). In

[7] As of December 31, 1974, 556,200 claims had been filed under Part B of the law. As of that date, with all but 400 cases decided, 509,900 individuals had established eligibility as black lung beneficiaries under the Act. Department of Health, Education, and Welfare, Fifth Annual Report to Congress on the Administration of Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969, p. 3 (1975).

the absence of such an approved state program, and to date no state program has been approved, claims are to be filed with and adjudicated by the Secretary of Labor, and paid by the mine operators. § 422, 30 U. S. C. § 932 (1970 ed. and Supp. IV). Under § 422 an operator who is entitled to a hearing in connection with these claims is liable for Part C benefits with respect to death or total disability due to pneumoconiosis arising out of employment in a mine for which the operator is responsible. The operator's liability for Part C benefits covers the period from January 1, 1974, to December 30, 1981. Payments of benefits under Part C are to the same categories of persons—a miner or certain survivors—and in the same amounts, as under Part B. §§ 422 (c), (d); see § 412 (a), 30 U. S. C. § 922 (a) (1970 ed. and Supp. IV).[8]

Claims filed during the transition period between the Federal Government benefit provision under Part B, and state plan or operator benefit provision under Part C—that is, July 1 to December 31, 1973—are adjudicated

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[8] The individual claimant is entitled to benefits at a rate equal to 50% of the minimum monthly payment to which a totally disabled federal employee in Grade GS–2 is entitled. § 412(a)(1), 30 U. S. C. § 922 (a)(1). At current rates, the individual claimant's entitlement is $196.80 per month, or $2,361.60 per year. 40 Fed. Reg. 56886–56887 (1975); see 20 CFR § 410.510 (1975). These basic benefits are increased if the claimant has dependents; the maximum increase of 100% is available if the claimant has three or more dependents. § 412 (a)(4), 30 U. S. C. § 922 (a)(4) (1970 ed., Supp. IV). See also 30 U. S. C. §§ 922 (a)(3), (5) (1970 ed., Supp. IV). Thus, the maximum in benefits to which a claimant could be entitled is $393.60 per month, or $4,723.20 per year. Benefits under Part C are reduced to account for certain alternative income. § 422 (g), 30 U. S. C. § 932 (g). In addition to these monthly benefits, the operators are responsible for claimants' medical expenses. See § 422 (a), 30 U. S. C. § 932 (a) (1970 ed., Supp. IV), incorporating 33 U. S. C. § 907 (1970 ed., Supp. IV).

under § 415 of Part B, 30 U. S. C. § 925 (1970 ed., Supp. IV), by the Secretary of Labor. The United States is responsible for payment of these claims until December 31, 1973. Responsible operators, having been notified of a claim and entitled to participate in a hearing thereon, are thereafter liable for benefits as if the claim had been filed pursuant to Part C and § 422 had been applicable to the operator.

The Act provides that a miner shall be considered "totally disabled," and consequently entitled to compensation, "when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." § 402 (f), 30 U. S. C. § 902 (f) (1970 ed., Supp. IV).[9] The Act also prescribes several "presumptions" for use in determining compensable disability.[10] Under § 411(c)(3), a miner

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[9] Section 402 (f), as set forth in 30 U. S. C. § 902 (f) (1970 ed., Supp. IV), provides in full:

"The term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 423 (d) of Title 42."

The Act defines "pneumoconiosis" as "a chronic dust disease of the lung arising out of employment in a coal mine." § 402 (b), 30 U. S. C. § 902 (b) (1970 ed., Supp. IV).

[10] These presumptions are applicable directly to Part B adjudications by the Secretary of HEW, and indirectly to transition-period and Part C adjudications by the Secretary of Labor by operation of §§ 422 (h) and 411 (b), 30 U. S. C. §§ 932 (h) and 921 (b) (1970 ed. and Supp. IV). See S. Rep. No. 92-743, p. 21 (1972). See also

shown by X-ray or other clinical evidence to be afflicted with complicated pneumoconiosis is "irrebuttably presumed" to be totally disabled due to pneumoconiosis; if he has died, it is irrebuttably presumed that he was totally disabled by pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis. 30 U. S. C. § 921 (c)(3) (1970 ed., Supp. IV). In any event, the presumption operates conclusively to establish entitlement to benefits.

The other presumptions are each explicitly rebuttable by an operator seeking to avoid liability. There are three such presumptions. First, if a miner with 10 or more years' employment in the mines contracts pneumoconiosis, it is rebuttably presumed that the disease arose out of such employment. § 411 (c)(1), 30 U. S. C. § 921 (c)(1) (1970 ed., Supp. IV). Second, if a miner with 10 or more years' employment in the mines died from a "respirable disease," it is rebuttably presumed that his death was due to pneumoconiosis. § 411 (c)(2), 30 U. S. C. § 921 (c)(2) (1970 ed., Supp. IV). Finally, if a miner, or the survivor of a miner, with 15 or more years' employment in underground coal mines is able, despite the absence of clinical evidence of complicated pneumoconiosis, to demonstrate a totally disabling respiratory or pulmonary impairment, the Act rebuttably presumes that the total disability is due to pneumoconiosis, that the miner was totally disabled by pneumoconiosis when he died, and that the miner's death was due to pneumoconiosis. § 411 (c)(4), 30 U. S. C. § 921 (c)(4) (1970 ed., Supp. IV).[11] Section 411 (c)(4) specifically provides: "The Secre-

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§§ 422 (f)(2), 430, 30 U. S. C. §§ 932 (f)(2), 940 (1970 ed., Supp. IV).

[11] The use of this presumption in Part C adjudications is limited in some regards not significant in this case. See §§ 422 (f)(2), 430, 30 U. S. C. §§ 932 (f)(2), 940 (1970 ed., Supp. IV).

tary may rebut [this latter] presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." Moreover, under § 413 (b), 30 U. S. C. § 923 (b) (1970 ed., Supp. IV), none of these three rebuttable presumptions may be defeated solely on the basis of a chest X-ray.[12]

## II

In initiating this suit against the defendant Secretaries (hereafter Federal Parties), the Operators contended that the amended Act is unconstitutional insofar as it requires the payment of benefits with respect to miners who left employment in the industry before the effective date of the Act; that the Act's definitions, presumptions, and limitations on rebuttal evidence unconstitutionally impair the operators' ability to defend against benefit claims; and that certain regulations promulgated by the Secretary of Labor regarding the apportionment of liability for benefits among operators, and the provision of medical benefits, are inconsistent with the Act and constitutionally defective.

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[12] Section 413 (b), as set forth in 30 U. S. C. § 923 (b) (1970 ed., Supp. IV), provides in pertinent part: "[N]o claim for benefits *under this part* shall be denied solely on the basis of the results of a chest roentgenogram." (Emphasis added.) Section 413 (b) is found in Part B of Title IV. Section 430, as set forth in 30 U. S. C. § 940 (1970 ed., Supp. IV), provides, however, that "[t]he amendments made by the Black Lung Benefits Act of 1972 to part B . . . shall, to the extent appropriate, also apply [with limitations not relevant here] to . . . part [C]." The legislative history, moreover, makes clear that the § 413 (b) limitation on use of X-ray evidence, enacted as § 4 (f) of the 1972 Act, was intended to apply to Part C claims as well as Part B claims, see H. R. Conf. Rep. No. 92-1048, p. 9 (1972), and the Operators so concede. Brief for Operators 21.

The three-judge District Court held that all issues as to the validity of the challenged regulations were within the jurisdiction of a single district judge, and the court entered an order so remanding them. 385 F. Supp., at 426. The District Court upheld each challenged statutory provision as constitutional, with two exceptions. First, the District Court held that § 411 (c)(3)'s irrebuttable presumption is unconstitutional as an unreasonable and arbitrary legislative finding of total disability "in terms other than those provided by the Act as standards for total disability." 385 F. Supp., at 430. Second, reading the limitation on evidence in rebuttal to § 411 (c)(4)'s presumption of total disability due to pneumoconiosis to apply to an operator's defense in a § 415 transition-period case, the District Court found that limitation unconstitutional in two respects. It held the limitation arbitrary and unreasonable in not permitting a rebuttal showing that the case of pneumoconiosis afflicting the miner was not disabling. 385 F. Supp., at 430. And taking the provision to mean that an operator may defend against liability only on the ground that the pneumoconiosis did not arise out of employment in *any* coal mine, rather than on the ground that it did not arise out of employment in a coal mine for which the operator was responsible, the District Court found the provision an unreasonable and arbitrary limitation on rebuttal evidence relevant and proper under § 422 (c), 30 U. S. C. § 932 (c). 385 F. Supp., at 430–431. The District Court accordingly entered an order declaring unconstitutional, and enjoining the Secretary of Labor from seeking to apply, § 411 (c)(3)'s irrebuttable presumption and § 411 (c)(4)'s limitation on rebuttable evidence.

The Operators' appeal, No. 74–1316, reasserts the constitutional challenges rejected by the District Court.

The appeal of the Federal Parties, No. 74–1302, seeks reversal of the declaration and injunction respecting the constitutionality of §§ 411 (c)(3) and (4). Neither side here questions the District Court's decision not to address the issues raised with respect to the Secretary of Labor's regulations. As we have already noted, we uphold the statute against all the constitutional contentions properly presented here. Because we read the limitation on rebuttal evidence in § 411 (c)(4) as inapplicable to the Operators, however, we vacate that portion of the District Court's order which invalidates that limitation.

## III

The Federal Parties direct our attention initially to *National Independent Coal Operators Assn.* v. *Brennan,* 372 F. Supp. 16 (DC), summarily aff'd, 419 U. S. 955 (1974), which raised a number of issues identical to those presented here. Our summary affirmance in that case did not foreclose the District Court's determination of unconstitutionality regarding §§ 411 (c)(3) and (4), those issues not having been before us on the appeal. Several questions presented here—most notably those of retroactivity and preclusion of sole reliance on X-ray testimony evidence—were raised and decided in *National Independent Coal Operators Assn.* v. *Brennan,* but having heard oral argument and entertained full briefing on these issues together with the other questions raised in the case, we proceed to treat them here more fully. Cf. *Edelman* v. *Jordan,* 415 U. S. 651, 670–671 (1974).

## IV

The Operators contend that the amended Act violates the Fifth Amendment Due Process Clause by requiring them to compensate former employees who terminated their work in the industry before the Act was passed,

and the survivors of such employees.[13] The Operators accept the liability imposed upon them to compensate employees working in coal mines now and in the future who are disabled by pneumoconiosis; and they recognize Congress' power to create a program for compensation of disabled inactive coal miners. But the Operators complain that to impose liability upon them for former employees' disabilities is impermissibly to charge them with an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time.

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488 (1955). And this Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee. *New York Central R. Co.* v. *White*, 243 U. S. 188 (1917); see also *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603 (1912).

To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated

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[13] For simplicity of discussion, we will generally refer to claims as though presented by the miner himself, although they may in fact be maintained upon death by a survivor. Neither the District Court nor the parties have distinguished miners' claims from survivors' claims under the constitutional attacks raised in this case.

before the date of enactment, the Act has some retrospective effect—although, as we have noted, the Act imposed no liability on operators until 1974.[14] And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment.[15] But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming* v. *Rhodes*, 331 U. S. 100 (1947); *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23 (1940); *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935); *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934); *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See *Lichter* v. *United States*, 334 U. S. 742 (1948); *Welch* v. *Henry*, 305 U. S. 134 (1938); *Funkhouser* v. *Preston Co.*, 290 U. S. 163 (1933).

It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively.

[14] The Federal Parties suggest that since a claim for benefits under Part C must be filed within three years of the discovery of total disability due to pneumoconiosis (or the date of death), § 422 (f)(1), 30 U. S. C. § 932 (f)(1) (1970 ed., Supp. IV), the operators will not ordinarily be liable for any disabilities maturing before enactment of their responsibility. See also § 422 (f)(2), 30 U. S. C. § 932 (f)(2) (1970 ed., Supp. IV). This does not hold true, however, for nonunderground operators, since Part C liability did not apply to them until 1972. See Black Lung Benefits Act of 1972, § 3, 86 Stat. 153, amending §§ 401, 402 (b), (d), 411 (c)(1), (2), 422 (a), (h), 423 (a), 30 U. S. C. §§ 901, 902 (b), (d), 921 (c)(1), (2), 932 (a), (h), 933 (a) (1970 ed., Supp. IV). In any event, we think the point unnecessary to our conclusion.

[15] The Operators have not contended, however, that the Act is constitutionally defective insofar as it requires them to provide compensation for *present* employees whose disabilities may stem from exposure that was terminated before enactment of the Act.

The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis.[16] While the Operators have clearly been aware of the danger of pneumoconiosis for at least 20 years,[17] and while they have not specifically pressed the contention that they would have taken steps to reduce or eliminate the incidence of pneumoconiosis had the law imposed liability upon them, we would nevertheless hesitate to approve the retrospective imposition of liability on any theory of deterrence, cf. *United States* v. *Peltier,* 422 U. S. 531, 542

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[16] Whether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct has been significant in at least one line of cases in this Court. In *Welch* v. *Henry,* 305 U. S. 134 (1938), the Court upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 taxing statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished prior cases invalidating the retroactive taxation of gifts on the ground that the donor might have refrained from making the gift had he anticipated the tax. *Id.,* at 147–148. But see *Carpenter* v. *Wabash R. Co.,* 309 U. S. 23 (1940); *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467 (1911).

[17] Coal miner's pneumoconiosis was recognized in Great Britain as early as 1943. It was not generally recognized in the United States as an entity distinct from silicosis until the 1950's. S. Rep. No. 91–411, p. 8 (1969).

(1975), or blameworthiness, cf. *ibid.*; *De Veau* v. *Braisted*, 363 U. S. 144, 160 (1960).

We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers. The Operators do not challenge Congress' power to impose the burden of past mine working conditions on the industry. They do claim, however, that the Act spreads costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business. The Operators note that a coal mine operator whose work force has declined may be faced with a total liability that is disproportionate to the number of miners currently employed. And they argue that the liability scheme gives an unfair competitive advantage to new entrants into the industry, who are not saddled with the burden of compensation for inactive miners' disabilities. In essence the Operators contend that competitive forces will prevent them from effectively passing on to the consumer the costs of compensation for inactive miners' disabilities, and will unfairly leave the burden on the early operators alone.

Of course, as we have already indicated, a substantial portion of the burden for disabilities stemming from the period prior to enactment is borne by the Federal Government. But even taking the Operators' argument at face value, it is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators, including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health. We are unwilling to assess the

wisdom of Congress' chosen scheme by examining the degree to which the "cost-savings" enjoyed by operators in the pre-enactment period produced "excess" profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension. See, *e. g., Ferguson* v. *Skrupa*, 372 U. S., at 730–732; *Williamson* v. *Lee Optical Co.*, 348 U. S., at 488.

The Operators ultimately rest their due process argument on *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935), in which the Court found the Railroad Retirement Act of 1934 to be unconstitutional. Among the provisions specifically invalidated as arbitrary was a provision for employer-financed pensions for former employees who, though not in the employ of the railroads at the time of enactment, had been so employed within the year. Assuming that the portion of *Alton* invalidating this provision retains vitality,[18] we find it distinguishable from this case. The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business.

In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a

[18] Mr. Chief Justice Hughes, joined by Justices Brandeis, Stone, and Cardozo, dissented from the Court's invalidating the Railroad Retirement Act altogether, but agreed with the Court that the provision for allowances to former employees was arbitrary. 295 U. S., at 374, 389.

former employee's death or disability due to pneumoconiosis arising out of employment in its mines, even if the former employee terminated his employment in the industry before the Act was passed.

V

We turn next to a consideration of the Operators' challenge to the "presumptions" and evidentiary rules governing adjudications of compensable disability under the Act.

A

The Act prescribes two alternative methods for showing "total disability," which is a prerequisite to compensation. First, a miner is "totally disabled" under the definition contained in § 402 (f), if pneumoconiosis, simple or complicated,

> "prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." [19]

Second, if a miner can show by clinical evidence (ordinarily X-ray evidence) that he is afflicted with complicated pneumoconiosis, the incurable and final stage of the disease, then the miner is deemed to be totally disabled under § 411 (c)(3).[20] Thus, Congress has mandated that

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[19] For the full text of § 402 (f) see n. 9, *supra*.

[20] Section 411 (c)(3), as set forth in 30 U. S. C. § 921 (c)(3) (1970 ed., Supp. IV), provides:

"[I]f a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is

the final stage of the disease is always compensable if its existence can be shown by positive clinical evidence, and that any stage of the disease is compensable when physically disabling under the terms of § 402 (f). The Operators maintain that both of these standards are constitutionally untenable.

(1)

The Operators contend that the definition of "total disability" set up in § 402 (f) is unconstitutionally arbitrary and irrational, because it provides for the compensation of former miners who might well be employable in other lines of work, and who therefore are not truly disabled by their mining-generated afflictions. We think it patent that this attack on § 402 (f) must fail. A miner disabled under § 402 (f) standards has suffered in at least two ways: His health is impaired, and he has been rendered unable to perform the kind of work to which he has adapted himself. Whether these interferences merit compensation is a public policy matter left primarily to the determination of the legislature. Cf. *Geduldig* v. *Aiello*, 417 U. S. 484 (1974). We cannot say that they are so insignificant as not to be a rational basis for compensation. Indeed, we long ago upheld against similar attack a workmen's compensation scheme providing benefits for injuries not depriving the employee of his ability to work. See *New York Central R. Co.* v. *Bianc*, 250 U. S. 596 (1919); cf. *Urie* v. *Thompson*, 337 U. S. 163, 181–187 (1949).

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made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be."

(2)

The District Court, relying on such cases as *Stanley* v. *Illinois,* 405 U. S. 645 (1972), and *Vlandis* v. *Kline,* 412 U. S. 441 (1973), invalidated § 411 (c)(3)'s "irrebuttable presumption" of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis. The presumption, the court explained,

> "forecloses all fact finding as to the effect of that disease upon a particular coal miner . . . . To the extent that such presumption purports to making a finding of total disability in terms other than those provided by [§ 402 (f)] as standards for total disability, it is unreasonable and arbitrary. As written, section [411 (c)(3)] is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled." 385 F. Supp., at 429–430.

We think the District Court erred in equating this case with those in the mold of *Stanley* and *Vlandis.*

As an operational matter, the effect of § 411 (c)(3)'s "irrebuttable presumption" of total disability is simply to establish entitlement in the case of a miner who is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment.[21] Indeed, the

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[21] Although the premise of § 411 (c)(3), that the miner have a "chronic dust disease of the lung," does not explicitly provide that the disease must be one arising out of employment in a coal mine, it is clear under § 422 (a), and hence under § 415 (a)(5) as well, that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine. Section 422 (a), as set forth in 30 U. S. C. § 932 (a) (1970 ed., Supp. IV), provides that Part C liability "[shall] be applicable to each operator of a coal mine . . . with respect to death or total disability due to pneumoconiosis arising out of employment in such mine."

legislative history discloses that it was precisely this advanced and progressive stage of the disease that Congress sought most certainly to compensate.[22] Were the Act phrased simply and directly to provide that operators were bound to provide benefits for all miners clinically demonstrating their affliction with complicated pneumoconiosis arising out of employment in the mines, we think it clear that there could be no due process objection to it. For, as we have already observed, destruction of earning capacity is not the sole legitimate basis for compulsory compensation of employees by their employers. *New York Central R. Co.* v. *Bianc, supra.* We cannot say that it would be irrational for Congress to conclude that impairment of health alone warrants compensation. Since Congress can clearly draft a statute to accomplish precisely what it has accomplished through § 411 (c) (3)'s presumption of disability, the argument is essentially that Congress has accomplished its result in an impermissible manner—by defining eligibility in terms of "total disability" and erecting an "irrebuttable presumption" of total disability upon a factual showing that does not necessarily satisfy the statutory definition of total disability. But in a statute such as this, regulat-

[22] The original House and Senate bills that gave rise to the Conference bill enacted as Title IV of the Federal Coal Mine Health and Safety Act of 1969 each provided for compensation only for complicated pneumoconiosis. H. R. 13950, 91st Cong., 1st Sess., §§ 112 (b)(1), (7)(B), as it passed the House, 115 Cong. Rec. 32061 (1969), contained the diagnostic criteria presently embodied in § 411 (c)(3), and deemed complicated pneumoconiosis to be "totally disabling" and compensable. S. 2917, 91st Cong., 1st Sess., §§ 501–504, as amended on the floor, 115 Cong. Rec. 27632 (1969), and passed, *id.*, at 28243, established a program of interim benefits for total disability due to complicated pneumoconiosis, and directed the Secretary of Health, Education, and Welfare to develop standards for determining total disability due to complicated pneumoconiosis.

ing purely economic matters, we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible. Cf. *Weinberger* v. *Salfi*, 422 U. S. 749, 767–785 (1975); *McDonald* v. *Board of Election*, 394 U. S. 802, 809 (1969); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154 (1938).

(3)

In addition to creating an irrebuttable presumption of total disability, § 411 (c)(3) provides that clinical evidence of a miner's complicated pneumoconiosis gives rise to an irrebuttable presumption that he was totally disabled by pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis. The effect of these presumptions, in particular the presumption of death due to pneumoconiosis, is to grant benefits to the survivors of any miner who during his lifetime had complicated pneumoconiosis arising out of employment in the mines, regardless of whether the miner's death was caused by pneumoconiosis. The Operators raise no separate challenge to these presumptions, and we would have no occasion to comment separately on them were it not for the Operators' general complaint against the application of the Act to employees who terminated their employment before the Act was passed. To the extent that the presumption of death due to pneumoconiosis is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread costs in a rational manner—by allocating to the operator an actual cost of his

business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

We think it clear, however, that the benefits authorized by § 411 (c)(3)'s presumption of death due to pneumoconiosis were intended not simply as compensation for damages due to the miner's *death,* but as deferred compensation for injury suffered during the miner's lifetime as a result of his illness itself. Thus, the Senate Report accompanying the 1972 amendments makes clear Congress' purpose to award benefits not only to widows whose husbands "[gave] their lives," but also to widows whose husbands "gave their health . . . in the service of the nation's critical coal needs." [23]

In the case of a miner who died with, but not from, pneumoconiosis *before* the Act was passed, the benefits serve as deferred compensation for the suffering endured by his dependents by virtue of his illness. And in the case of a miner who died with, but not from, pneumoconiosis *after* the Act was passed, the benefits serve an additional purpose: The miner's knowledge that his dependent survivors would receive benefits serves to compensate him for the suffering he endures. In short, § 411 (c)(3)'s presumption of death due to pneumoconiosis authorizes compensation for injury attributable to the operator's business, and viewed as such it poses no retroactivity problems distinct from those considered in our prior discussion.

It might be suggested that the payment of benefits to dependent survivors is irrational as a scheme of compensation for injury suffered as a result of a miner's disability. But we cannot say that the scheme is wholly

[23] S. Rep. No. 92–743, p. 8 (1972).

unreasonable in providing benefits for those who were most likely to have shared the miner's suffering. Nor can we say that the scheme is arbitrary simply because it spreads the payment of benefits over a period of time.[24]

We might face a more difficult problem in applying § 411 (c)(3)'s presumption of death due to pneumoconiosis on a retrospective basis if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, and who during his life was completely unaware of and unaffected by his illness; or, in the case of a miner who died before the Act was passed, if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, who nevertheless was aware of and affected by his illness, but whose dependents were completely unaware of and unaffected by his illness. But the Operators in their facial attack on the Act have not suggested that a miner whose condition was serious enough to activate the § 411 (c)(3) presumptions might not have been affected in any way by his condition, or that the family of such a miner might not have noticed it. Under the

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[24] Under the present scheme, the payment of monthly benefits is not without limit. Section 422 (e), as set forth in 30 U. S. C. § 932 (e) (1970 ed., Supp. IV), quite clearly provides that "[n]o payment of benefits shall be required under this section . . . (2) for any period prior to January 1, 1974; or (3) for any period after twelve years after December 30, 1969." This time limitation, applicable in Part C cases by its terms, is also applicable to transition-period cases by virtue of § 415 (a)(5), 30 U. S. C. § 925 (a)(5) (1970 ed., Supp. IV). Thus, the operator is liable for monthly payments only for a period of eight years. The total amount payable to a single dependent survivor during this period, under current rates, is approximately $18,900. The maximum amount for which the operator would be liable, if the miner had four or more dependent survivors, is approximately $37,800. See n. 8, *supra*.

circumstances, we decline to engage in speculation as to whether such cases may arise.[25]

B

Turning our attention to the statutory regulations of proof of § 402 (f) disability, we focus initially on the Operators' challenge to the presumptions contained in §§ 411 (c)(1) and (2). Section 411 (c)(1) provides that a coal miner with 10 years' employment in the mines who suffers from pneumoconiosis will be presumed to have contracted the disease from his employment.[26] Section 411 (c)(2) provides that if a coal miner with 10 years' employment in the mines dies from a respiratory disease, his death will be presumed to have been due to pneumoconiosis.[27] Each presumption is explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator. See Fed. Rule Evid. 301.

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[25] Our analysis of the retrospective application of the § 411 (c)(3) presumption of death due to pneumoconiosis is, of course, fully applicable to the retrospective application of any other provisions that might be construed to authorize benefits in the case of miners who die with, but not from, totally disabling pneumoconiosis. See §§ 422 (a), (c), 412 (a)(2), (3), (5), 411 (a), 30 U. S. C. §§ 932 (a), (c), 922 (a)(2), (3), (5), 921 (a) (1970 ed. and Supp. IV).

[26] Section 411 (c)(1), as set forth in 30 U. S. C. § 921 (c)(1) (1970 ed., Supp. IV), provides in full:

"[I]f a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment."

[27] Section 411 (c)(2), as set forth in 30 U. S. C. § 921 (c)(2) (1970 ed., Supp. IV), provides in full:

"[I]f a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis."

We have consistently tested presumptions arising in civil statutes such as this, involving matters of economic regulation, against the standard articulated in *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43 (1910):

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

See *Atlantic Coast Line R. Co.* v. *Ford*, 287 U. S. 502 (1933); *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 19 (1931). See also *Leary* v. *United States*, 395 U. S. 6, 29–53 (1969); *Tot* v. *United States*, 319 U. S. 463, 467–468 (1943). Moreover, as we have recognized:

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U. S. 63, 67 (1965).

Judged by these standards, the presumptions contained in §§ 411 (c)(1) and (2) are constitutionally valid. The Operators focus their attack on the rationality of the presumptions' bases in duration of employment. But it is agreed here that pneumoconiosis is caused by breathing coal dust, and that the likelihood of a miner's developing the disease rests upon both the concentration of dust to which he was exposed and the duration of his exposure. Against this scientific background, it was not

beyond Congress' authority to refer to exposure factors in establishing a presumption that throws the burden of going forward on the operators. And in view of the medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with 10 years' employment in the mines,[28] we cannot say that it was "purely arbitrary" for Congress to select the 10-year figure as a point of reference for these presumptions. No greater mathematical precision is required. Cf. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911).

The Operators insist, however, that the 10-year presumptions are arbitrary, because they fail to account for varying degrees of exposure, some of which would pose lesser dangers than others. We reject this contention. In providing for a shifting of the burden of going forward to the operators, Congress was no more constrained to require a preliminary showing of the degree of dust concentration to which a miner was exposed, a historical fact difficult for the miner to prove, than it was to require a preliminary showing with respect to all other factors that might bear on the danger of infection. It is worth repeating that mine employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves along with proof of pneumoconiosis under § 411 (c)(1) to presumptively establish the cause of pneumoconiosis, and along with proof of death from a respiratory disease under § 411 (c)(2) to presumptively establish that death was due to pneumoconiosis. In its "rough accommodations," *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69 (1913), Congress was surely entitled to select duration of em-

[28] See, *e. g.*, Hearings on S. 355, *supra*, n. 1, at 699 (testimony of Dr. Werner A. Laqueur).

ployment, to the exclusion of the degree of dust exposure and other relevant factors, as signaling the point at which the operator must come forward with evidence of the cause of pneumoconiosis or death, as the case may be. We certainly cannot say that the presumptions, by excluding other relevant factors, operate in a "purely arbitrary" manner. *Mobile, J. & K. C. R. Co.* v. *Turnipseed, supra,* at 43.

The Operators press the same due process attack upon the durational basis of the rebuttable presumption in § 411 (c)(4), which provides, *inter alia,* that a miner employed for 15 years in underground mines, who is able to marshal evidence demonstrating a totally disabling respiratory or pulmonary impairment, shall be rebuttably presumed to be totally disabled by pneumoconiosis.[29] Par-

[29] Section 411 (c)(4), as set forth in 30 U. S. C. § 921 (c)(4) (1970 ed., Supp. IV), provides in full:

"[I]f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

ticularly in light of the Surgeon General's testimony at the Senate hearings on the 1969 Act to the effect that the 15-year point marks the beginning of linear increase in the prevalence of the disease with years spent underground,[30] we think it clear that the durational basis of this presumption is equally unassailable.

C

The Operators also challenge § 413 (b) of the Act, which provides that "no claim for benefits . . . shall be denied solely on the basis of the results of a chest roentgenogram [X-ray]." [31] Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts. See, *e. g.*, *Hawkins* v. *United States*, 358 U. S. 74, 78 (1958); *Tot* v. *United States*, 319 U. S., at 467; cf. *Lindsley* v. *Natural Carbonic Gas Co.*, *supra*, at 81. The Operators contend, however, that § 413 (b) denies them due process because X-ray evidence is frequently the sole evidence they can marshal to rebut a claim of pneumoconiosis.[32] We conclude that, given Congress' reasoned reservations regarding the reliability of negative X-ray evidence, it was entitled to preclude exclusive reliance on such evidence.

Congress was presented with significant evidence demonstrating that X-ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trust-

[30] See S. Rep. No. 92–743, p. 13 (1972).

[31] See n. 12, *supra*.

[32] The Operators frame their argument by saying that the effect of § 413 (b) is to render the rebuttable presumptions of § 411 (c) effectively irrebuttable. But this dressing adds nothing. Once it is determined that the limitation on X-ray evidence is permissible generally, it is irrelevant that the burden of going forward with some rebuttal evidence is thrown upon the operator by a permissible presumption rather than by the claimant's affirmative factual showing.

worthy indicator of the absence of the disease.[33] In particular, the findings of the Surgeon General and others indicated that although X-ray evidence was generally the most important diagnostic tool in identifying the presence or absence of pneumoconiosis, when considered alone it was not a wholly reliable indicator of the *absence* of the disease; that autopsy frequently disclosed pneumoconiosis where X-ray evidence had disclosed none;[34] and that pneumoconiosis may be masked from X-ray detection by other disease.[35]

Taking these indications of the unreliability of negative X-ray diagnosis at face value, Congress was faced with the problem of determining which side should bear the burden of the unreliability. On the one hand, preclusion of any reliance on negative X-ray evidence would risk the success of some nonmeritorious claims; on the other hand, reliance on uncorroborated negative X-ray evidence would risk the denial of benefits in a significant number of meritorious cases. Congress addressed the problem by adopting a rule which, while preserving some of the utility, avoided the worst dangers of X-ray evidence. Section 413 (b) does not make negative X-ray evidence inadmissible, or ineligible to be considered as ultimately persuasive evidence when taken together with other factors—for example, a low level of coal dust concentration in the operator's mine, a relatively short dura-

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[33] Our attention has not been directed to any authoritative indications that X-ray evidence of the *presence* of pneumoconiosis is untrustworthy.

[34] Evidence was produced at the Senate hearings showing that in one study "approximately 25 percent of a random sample of some 200 coal miners whose medical records based upon X-ray findings showed no coal-worker's pneumoconiosis were found on post mortem examination to have the disease." S. Rep. No. 92-743, *supra*, at 12.

[35] *Id.*, at 9–16; H. R. Rep. No. 92-460, pp. 8–10 (1971).

tion of exposure to coal dust, or the likelihood that the miner is disabled by some other cause.[36] The prohibition is only against sole reliance upon negative X-ray evidence in rejecting a claim.

The Operators attack the limitation on the use of negative X-ray evidence by suggesting that Congress' conclusion as to the unreliability of negative X-ray evidence is constitutionally unsupportable. Relying on other evidence submitted to Congress in 1972,[37] the Operators contend that the consensus of medical judgment on the question is that good quality X-ray evidence does reliably indicate the presence or absence of pneumoconiosis. In essence, the Operators seek a judicial reconsideration of the judgment of Congress on this issue. But the reliability of negative X-ray evidence was debated forcefully on both sides before the Congress, and the Operators here suggest nothing new to add to the debate; they are simply dissatisfied with Congress' conclusion. As we have recognized in the past, however, when it comes to evidentiary rules in matters "not within specialized judicial competence or completely commonplace," it is primarily for Congress "to amass the stuff of actual ex-

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[36] Section 413 (b) directs additionally that

"[i]n determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials." 30 U. S. C. § 923 (b) (1970 ed., Supp. IV).

[37] This evidence was brought to the hearings by the Social Security Administration, whose rules the § 413 (b) limitation was designed to overrule, and was credited by the minority of the House Committee on Education and Labor. H. R. Rep. No. 92–460, *supra,* at 22, 29–30.

perience and cull conclusions from it." *United States* v. *Gainey*, 380 U. S., at 67. It is sufficient that the evidence before Congress showed doubts about the reliability of negative X-ray evidence. That Congress ultimately determined "to resolve doubts in favor of the disabled miner" [38] does not render the enactment arbitrary under the standard of rationality appropriate to this legislation.

D

Finally, the Operators challenge the limitation on rebuttal evidence contained in § 411 (c)(4). That section, as we have indicated, provides that a miner employed for 15 years in underground mines who is able to demonstrate a totally disabling respiratory or pulmonary impairment shall be rebuttably presumed to be totally disabled by pneumoconiosis, and his death shall be rebuttably presumed to be due to pneumoconiosis. The final sentence of § 411 (c)(4) provides that

> "[t]he Secretary may rebut [the presumption provided herein] only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

The effect of this limitation on rebuttal evidence is, *inter alia*, to grant benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis. The Operators contend that this limitation erects an impermissible irrebuttable presumption, because it establishes liability even though it might be medically demonstrable in an individual case that the miner's

[38] S. Rep. No. 92-743, *supra*, at 11.

pneumoconiosis was mild and did not cause the disability—that the disability was wholly a product of other disease, such as tuberculosis or emphysema. Disability due to these diseases, as the Operators note, is not otherwise compensable under the Act.

The District Court, concluding that the quoted limitation on rebuttal evidence applied against an operator in a § 415 transition-period case, and recognizing that pneumoconiosis is not inherently disabling in the § 402 (f) sense, judged this limitation unconstitutional on the ground that it deprived an operator of a factual defense—that the miner is not "totally disabled" due to pneumoconiosis under § 402 (f). Additionally, reading the second part of the § 411 (c)(4) limitation on rebuttal to preclude an operator's defense that the disease did not arise out of employment in the particular mines for which it was responsible, the District Court found this aspect of § 411 (c)(4) unconstitutional as well.

The Federal Parties urge on their cross-appeal that these constitutional judgments are erroneous. We need not inquire into the constitutional questions raised by the District Court, however, because we think it clear as a matter of statutory construction that the § 411 (c)(4) limitation on rebuttal evidence is inapplicable to operators. By the language of § 411 (c)(4), the limitation applies only to "the Secretary" and not to an operator seeking to avoid liability under § 415 or § 422. And this plain language is fortified by the legislative history. The Senate Report on § 411 (c)(4) specifically states that the limitation on rebuttal applies to the Secretary of Health, Education, and Welfare, but nowhere suggests that it binds an operator.[39]

[39] *Id.*, at 12. Similarly, the Conference Report refers to the limitation only as running against "the Secretary." S. Conf. Rep. No. 92-780, p. 8 (1972); H. R. Conf. Rep. No. 92-1048, p. 8 (1972).

While apparently recognizing that the § 411 (c)(4) limitation on rebuttal evidence could not apply against an operator in a Part C determination, the District Court believed that the limitation bound an operator in the determination of a claim filed during the § 415 transition period, "[s]ince under section [415] the operator is bound by the Secretary's finding of liability under Part B." 385 F. Supp., at 430. In so concluding, the District Court was in error. First, it would appear, again from the plain language of the statute, that the reference to "the Secretary" in § 411 (c)(4) does not refer to the Secretary of Labor. On the contrary, § 402 (c), 30 U. S. C. § 902 (c), quite plainly defines "Secretary" when used in Part B, including § 411, as meaning the Secretary of Health, Education, and Welfare, not the Secretary of Labor. The Senate Report referred to above confirms this conclusion. Even assuming, however, that the § 411 (c)(4) limitation on rebuttal by "the Secretary" may be taken to bind the Secretary of Labor insofar as he was required to *pay* benefits for which the United States was liable during the transition period, § 415 (a)(1), we have found nothing in the statute or in its legislative history to suggest that an operator is similarly bound because the Secretary of Labor is also to *adjudicate* the operator's liability. § 415 (a)(5). Indeed, such a reading would render a mine operator bound by the rebuttal limitation in § 415 transition-period cases, although not so bound in cases filed thereafter under Part C. And that result would be contrary to the language of § 415 (a)(5), which prescribes that an operator "shall be bound by the determination of the Secretary of Labor [on a § 415 transition-period claim] as if the claim had been filed pursuant to part C."

In short, we conclude that the Act does not itself limit the evidence with which an operator may rebut the

§ 411 (c)(4) presumption. Accordingly, we vacate the order of the District Court declaring the § 411 (c)(4) limitation on rebuttal evidence unconstitutional and enjoining the Secretary of Labor from limiting evidence in rebuttal to the § 411 (c)(4) presumption. Cf. *Van Lare* v. *Hurley*, 421 U. S. 338, 344 (1975); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

We are aware that regulations promulgated in 1972 by the Secretary of Health, Education, and Welfare under his § 411 (b) authorization, 20 CFR §§ 410.414, 410.454 (1975), applicable to Part C determinations under § 422 (h), and expressly adopted in 1973 by the Secretary of Labor, 20 CFR pt. 718 (1975), authorize limitations on rebuttal evidence similar to those contained in § 411 (c)(4), and appear to apply in determinations of an operator's liability. But the Operators' amended complaint never challenged the statutory or constitutional validity of these regulations.[40] Particularly in the absence of any mention of the regulations in the opinion and judgment of the District Court, or in the briefs and oral arguments of the parties, we find it inappropriate to consider their statutory or constitutional validity at this stage.[41]

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[40] It follows from our discussion of the § 411 (c)(4) limitation on rebuttal that these regulations cannot stand as authoritative administrative interpretations of the statute itself. But the role of regulations is not merely interpretative; they may instead be designedly creative in a substantive sense, if so authorized. See, *e. g.*, *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973). If the regulations promulgated here are to be upheld, it must be in this latter sense.

[41] We see no reason to remand the case to the three-judge District Court for the purpose of determining whether the Operators should be granted leave to amend their complaint to include a statutory and constitutional challenge to the regulations. The three-judge court remanded to a single judge all questions regarding the validity of regulations challenged in the Operators' complaint, and that portion of the case is pending before a single judge. Any motion

VI

In sum, the challenged provisions, as construed, are constitutionally sound against the Operators' facial attack. The judgment of the District Court as appealed from in No. 74–1316 is affirmed. The judgment of the District Court as appealed from in No. 74–1302 is reversed, except insofar as it declares unconstitutional, and enjoins the operation of, the limitation on rebuttal evidence contained in § 411 (c)(4) of the Act. In this latter respect, the judgment in No. 74–1302 is vacated, and the case remanded with directions to dismiss.

*It is so ordered.*

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. JUSTICE POWELL, concurring in part and concurring in the judgment in part.

Appellants in No. 74–1316, the Operators, challenge as unconstitutional the retroactive obligations imposed on them by the Federal Coal Mine Health and Safety Act of 1969 (Act), 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U. S. C. § 901 *et seq.* (1970 ed. and Supp. IV). The Court rejects their contention in Part IV of its opinion. I concur in the judgment as to Part IV, and concur in other portions of the opinion not inconsistent with the views herein expressed.

I

Coal miner's pneumoconiosis was not recognized in the United States until the 1950's, and there was no federal

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for leave to amend the complaint to include a challenge to any additional regulations can be addressed to that single judge.

legislation providing benefits to its victims until the enactment of this statute in 1969. In Title IV of the Act, Congress significantly redefined the respective rights and obligations of miners and their employers in regard to this disease by establishing a benefits scheme to compensate victims of pneumoconiosis.[1] Under Title IV miners who filed claims before July 1, 1973, are to collect benefits from the Federal Government, §§ 411–414, 30 U. S. C. §§ 921–924 (1970 ed. and Supp. IV).[2] Miners filing claims after June 30, 1973, are to collect benefits until 1981, see *ante,* at 26 n. 24, from their individual employers. §§ 415, 421–431, 30 U. S. C. §§ 925, 931–941 (1970 ed. and Supp. IV).[3] Under the statute, the class of claimants to which individual employers are liable includes both (i) miners employed at the time of or after enactment and (ii) miners no longer employed in the industry at the time of enactment (former miners).

The unprecedented feature of the Act is that miners may be eligible to receive benefits from a particular coal-mining concern even if the miner was no longer employed in the industry at the time of enactment. The

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[1] Title II of the Act prescribes the maintenance of less hazardous mine conditions in the future. § 201 *et seq.,* 30 U. S. C. § 841 *et seq.*

[2] As does the Court, I simplify by not distinguishing between claims by employees and claims by their survivors. See *ante,* at 15 n. 13.

[3] Claims filed between July 1, 1973, and December 31, 1973, were to be paid by the Federal Government until December 31, 1973, after which they became the responsibility of individual mining concerns. § 415, 30 U. S. C. § 925 (1970 ed., Supp. IV). Liability on the part of individual mining concerns arises only if the claimant does not have recourse to an applicable state workmen's compensation program approved by the Secretary of Labor, §§ 421–422, 30 U. S. C. §§ 931–932 (1970 ed. and Supp. IV), but no such state programs have been approved. See *ante,* at 8–9.

Department of Labor already has made initial determinations of liability against one of the Operators and in favor of claimants whose employment terminated decades ago.[4]

## II

The Operators do not challenge their liability to miners employed at the time of or after enactment, a liability which accords with familiar principles of workmen's compensation.[5] They contend, however, that a statutory liability to former miners has been imposed in violation of the Fifth Amendment guarantee against arbitrary, irrational, or discriminatory legislation, see, *e. g.*, *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971), as there

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[4] Favorable initial determinations have been made for claimants who left mine work in 1923, 1927, 1931, 1932, 1937, 1943, 1946, and 1948. Brief for Operators 30 n. 1. These determinations rebut the federal parties' suggestion that in combination the initial period of federal liability and the statute of limitations specified in § 422 (f)(1), 30 U. S. C. § 932 (f)(1) (1970 ed., Supp. IV), will prevent employer liability to miners who left the industry before passage of the Act. See *ante*, at 16 n. 14.

[5] Congress apparently recognized that the employers burdened by retroactive liability were not blameworthy. Senator Javits, who played a significant role in the development of individual-employer liability, see Brief for Operators 34, thought that the "blame" for past neglect must be shared by "all of us," including "the industry, the medical profession, and the Government—particularly the Public Health Service." House Committee on Education and Labor, 91st Cong., 2d Sess., Legislative History/Federal Coal Mine Health and Safety Act 338 (Committee Print 1970), 115 Cong. Rec. 27627 (1969) (floor remarks).

The retroactive nature of the liability makes deterrence an insufficient justification. In their prospective application, it is rational for Title IV and other workmen's compensation schemes to disadvantage competitively employers who take less effective precautions to protect their employees. But only prospective liability creates an incentive for occupational safety measures.

is no rational justification for imposing liability to former miners upon individual mine owners.

The Court recognizes that its evaluation of the rationality of the employers' challenged liability must take into account the retroactive nature of the liability:

> "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law . . . ." *Ante,* at 17.

The Court then acknowledges that the Act would not be justified "on any theory of deterrence . . . or blameworthiness." *Ante,* at 17–18. It nonetheless sustains the provision for retroactive liability, reasoning as follows:

> "We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Ante,* at 18.
>
> "We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost-spreading rationally . . . ." *Ante,* at 18–19.

In my view whether the retroactive liability is constitutional is a considerably closer question than the Court's treatment suggests. The rationality of retrospective liability as a cost-spreading device is highly questionable.

If coal-mining concerns actually enjoyed "excess" profits in the pre-enactment period by virtue of their nonliability for pneumoconiosis, and if such profits could be quantified in some discernible way, Congress rationally could impose retrospective liability for the benefit of the miners concerned. But, in this context, the term "excess profits" must mean profits over and above those that operators would have made in years and decades past if they had set aside from current operations funds sufficient to provide compensation, although under no obligation to do so. It is unlikely that such profits existed. The coal industry is highly competitive and prices normally are determined by market forces. One therefore would expect that, had a compensation increment been added to operating costs, the operators over the long term simply would have passed most of it on to consumers, thereby leaving their profitability relatively unaffected. In short, the talk of "excess profits" in any realistic sense is wholly speculative.

Nor can I accept without serious question the Court's view that the costs now imposed by the Act may be passed on to consumers. Firms burdened with retroactive payments must meet that expense from current production and current sales in a market where prices must be competitive with the prices of firms not so burdened. One ordinarily would expect that if burdened firms are to meet both competitive prices and their retroactive obligations, their profits necessarily will be less than those of their competitors. Thus, the burdened firms in all likelihood will have to bear the costs of the

retroactive liability rather than pass those costs on to consumers. And they must bear such costs quite without regard to whether "excess profits" may have been made in some earlier years.[6]

In some industries conditions might be such that the cost of retroactively imposed benefits could be spread to consumers. It seems most unlikely, however, that the coal industry is such an industry. A notable fact about coal mining is that the industry currently employs only about 150,000 persons, whereas in 1939 it employed nearly 450,000. Brief for Operators 24. The reduced scale of employment in the coal industry, combined with the liability to former miners and their survivors, means that retroactive obligations almost certainly will be disproportionate to the scale of current operations.[7] Moreover, it is unlikely that liability to former miners will be distributed randomly across the industry, as it is dictated by historical patterns that may be wholly unrelated to the present contours of the industry. Two examples are illustrative: (i) Some coal-mining concerns have been in the mining business for decades, while some competitors have commenced operation more recently. The exposure of the former group to claims of employees long separated from active employment is likely to be significantly

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[6] It is, of course, impossible to spread the cost to "coal consumers" who "profited from the fruits of [former employees'] labor." *Ante*, at 18. A coal-mining concern cannot retroactively increase its prices to the former customers who benefited from the pre-1969 labors of former miners. The only consumers, therefore, who could bear these burdens are those who purchase coal currently. But in a free market such customers cannot be expected to pay a reparation add-on for coal produced by disadvantaged coal companies when the same product is readily obtainable from others at a lower price.

[7] Indeed, the number of former miners and survivors whom an individual employer is obliged to compensate could be larger than the employer's present work force.

greater than that of their competitors. (ii) Some companies engaged in coal mining in years past on a much larger scale and with many more employees than currently. This is not an unusual situation in a "depleting asset" industry, where smaller companies often lack the resources with which to continue the acquisition and development of new properties. Stronger competitors, on the other hand, may have operated on a constant or an increasingly large scale.[8] In each case the competitively disadvantaged companies may be unable to spread a substantial portion of their costs to consumers. In view of these considerations it is unrealistic to think that the Act will spread costs to "the operators and the coal consumers," *ante*, at 18, and thus I question the Court's conclusion that the Act is rational in imposing retroactive liability.

III

Despite the foregoing, I must concur in the judgment on the record before us. Congress had broad discretion in formulating a statute to deal with the serious problem of pneumoconiosis affecting former miners. *E. g., Richardson* v. *Belcher*, 404 U. S. 78 (1971); cf. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). Nor does the Constitution require that legislation on economic matters be compatible with sound economics or even with normal fairness. As a result, economic and remedial social enactments carry a strong presumption of constitutionality, *e. g., United States* v. *Carolene Products Co.*, 304 U. S. 144, 148 (1938), and the Operators had the heavy burden of showing the Act to be unconstitutional.

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[8] In addition, the incidence of liability to former miners may be skewed artificially by the regulation imposing liability upon the company which last employed the claimant without regard to previous employment with other companies. 20 CFR § 725.311 (1975). The validity of this regulation remains to be considered. See *ante*, at 14.

The constitutionality of the retrospective liability in question here ultimately turns on the sophisticated questions of economic fact suggested above, and these facts are likely to vary widely among the Operators.[9] In this case, however, decided on the cross-motions for summary judgment, the Operators have failed to make any *factual* showings that support their sweeping assertions of irrationality. Although I find these assertions strongly suggestive that Congress has acted irrationally in pursuing a legitimate end, I am not satisfied that they are sufficient—in the absence of appropriate factual support—to override the presumption of constitutionality. Accordingly, I agree that the federal parties were entitled to summary judgment on this record.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

While in all other respects joining the opinion and judgment of the Court, I cannot accept the Court's conclusion, *ante,* at 36–37, that the limitation on rebuttal evidence in § 411 (c)(4), 30 U. S. C. § 921 (c)(4) (1970 ed., Supp. IV), is inapplicable to "transition" determinations under § 415 insofar as those determinations bind operators. Section 415 (a)(5), as set forth in 30 U. S. C. § 925 (a)(5) (1970 ed., Supp. IV), provides that an "operator . . . shall be bound by the determination of the Secretary of Labor [on a transition] claim as if the claim had been filed pursuant to part C of this subchapter and section 932 of this title had been applicable to such operator." As the Court correctly observes, the critical question is thus whether the § 411 (c)(4) limi-

[9] I would not foreclose the possibility that a particular coal-mining concern, in a proper case, may be able to show that the impact of the Act on *its* operations is irrational. Cf. *ante,* at 26–27.

tation would apply "if the claim had been filed pursuant to part C . . . and section 932 . . . ."

The Court reads the "plain language" of § 411 (c)(4), and in particular the reference to "the Secretary [of Health, Education, and Welfare]," to mean that "the limitation applies only to 'the Secretary' and not to an operator seeking to avoid liability under § 415 [30 U. S. C. § 925] or § 422 [30 U. S. C. § 932]." *Ante,* at 35. This reading, the Court concludes, is "fortified by the legislative history" and in particular by the "Senate Report on § 411 (c)(4) [which] specifically states that the limitation on rebuttal applies to the Secretary of Health, Education, and Welfare, but nowhere suggests that it binds an operator." *Ibid.*

The Court's analysis omits any consideration of the effect of § 430, as set forth in 30 U. S. C. § 940 (1970 ed., Supp. IV), which provides as follows:

> "The amendments made by the Black Lung Benefits Act of 1972 to part B of this subchapter shall, to the extent appropriate, also apply to [Part C]: *Provided,* That for the purpose of determining the applicability of the presumption established by section 921 (c)(4) of this title to claims filed under this part, no period of employment after June 30, 1971, shall be considered in determining whether a miner was employed at least fifteen years in one or more underground mines."

Since the limitation on rebuttal evidence in § 411 (c)(4) was created by the "amendments made by the Black Lung Benefits Act of 1972," it would seem to follow that the limitation applies to Part C determinations. This inference is reinforced by the Senate Report, which stated:

> "New section 430 requires that amendments to

part B be applied, wherever appropriate, to part C. . . .

"Questions were raised during the Committee deliberations over whether the amendments to part B would automatically be applicable, where appropriate, to part C.

. . . . . .

"Although it would appear clear that the same standards are to govern, the Committee concluded that it would be best to so specify.

"It is contemplated by the Committee that the applicable portions of following sections of part B, as amended, would apply to part C: section 411, section 412 (except the last sentence of subsection (b) thereof), section 413, and section 414." S. Rep. No. 92–743, p. 21 (1972).

See also *id.*, at 33.

The only play in the tight linkage of Part C to the amendments to Part B is that afforded by the proviso in § 430 and by the phrase "to the extent appropriate" which appears in that section. The proviso does not remove the rebuttal limitation, but it does alter § 411 (c)(4)'s allocation of the burden of proof in another crucial respect: It limits the period of employment which may be considered for purposes of determining the applicability of the presumption. The presence of the proviso is relevant in two respects. First, it underscores the basic applicability to Part C determinations of the § 411 (c)(4) rebuttal presumption. Second, it demonstrates that Congress knew how to place a significant limitation on the applicability of that presumption when it chose to do so.

The care and precision which Congress used in drafting this qualifying language bears on the propriety of reading the phrase "to the extent appropriate" as obliquely qualifying the applicability of the rebuttal limitation to

Part C determinations. That limitation is part and parcel of an elaborate reallocation of the burden of proving disability resulting from pneumoconiosis. Under prior Social Security procedure "if an X-ray [did] not show totally disabling pneumoconiosis, no further processing of a claim [was] allowed. Thus, any further evidence of disability [was] not allowed if the X-ray show[ed] negative." S. Rep. No. 92–743, *supra,* at 11. This heavy reliance on X-ray evidence had unfortunate consequences for coal miners because of the inability of X-ray examinations to detect pneumoconiosis in some instances. Congress responded to this particular problem by

> "prohibiting denial of a claim solely on the basis of an X-ray, by providing a presumption of pneumoconiosis for miners with respiratory or pulmonary disability where they have worked 15 years or more in a coal mine, and by requiring the Social Security Administration to use tests other than the X-ray to establish the basis for a judgment that a miner is or is not totally disabled due to pneumoconiosis." *Ibid.*

The 15-year rebuttable presumption embodied in § 411 (c)(4) was perhaps the most significant feature of Congress' response. Based in part on testimony of the Surgeon General that "[f]or work periods greater than 15 years underground, there was a linear increase in the prevalence of the disease with years spent underground," S. Rep. No. 92–743, *supra,* at 13, the presumption embodied a congressional decision to "giv[e] the benefit of the doubt," *id.,* at 11, to a specific class of claimants totally disabled by respiratory or pulmonary impairments who could not prove by X-ray evidence that the impairment resulted from pneumoconiosis. The presumption was rebuttable only if the respondent could show either that "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of,

or in connection with, employment in a coal mine." § 411 (c)(4), 30 U. S. C. § 921 (c)(4) (1970 ed., Supp. IV).

It is difficult to believe that Congress would have used the phrase "to the extent appropriate" in § 430 to withdraw the protection of the rebuttal limitation under Part C while retaining the rebuttable presumption of which it is an integral part. Such an interpretation is inconsistent with the care Congress displayed in drafting the § 430 proviso. Moreover, it leads necessarily to other improbable results. The Court's approach, for instance, necessarily implies that Congress extended the benefit of the § 411 (c)(4) presumption to "surface, as well as underground, miners [in specified circumstances]," S. Rep. No. 92–743, *supra*, at 2, with the intention that the protection would lapse as soon as Part C came into play. The relevant sentence in § 411 (c)(4) states that "[t]he *Secretary* [of Health, Education, and Welfare] shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine." (Emphasis added.) If the operative principle is that provisions in § 411 (c)(4) which bind "the Secretary [of Health, Education, and Welfare]" are automatically "inappropriate" for Part C proceedings, then surface miners would be stripped of the benefits of § 411 (c)(4) as soon as the legislative scheme enters its transitional stage.

Moreover, the Court's reading of the statute is anomalous in terms of the overall structure of Part C. The primary goal of Congress in framing Part C was to transfer adjudicatory responsibilities over coal miners' pneumoconiosis claims to state workmen's compensation tribunals, but only if the state compensation law was

found by the Secretary of Labor to provide "standards for determining death or total disability due to pneumoconiosis . . . substantially equivalent to . . . those standards established under part B of this subchapter . . . ." § 421 (b)(2)(C), as set forth in 30 U. S. C. § 931 (b)(2)(C) (1970 ed., Supp. IV). One of the Part B standards is the rebuttal limitation in § 411 (c)(4). Thus, the Secretary of Labor would not be empowered to approve a state law which did not contain a "substantially equivalent" evidentiary limitation.

The delegation of adjudicatory responsibility to the Secretary of Labor under Part C was a backstop measure, intended to provide a forum for presentation of claims during any period after January 1, 1974, when a state workmen's compensation law was not included on the Secretary of Labor's list of state laws with provisions "substantially equivalent" to those in Part B. § 421 (a), 30 U. S. C. § 931 (a) (1970 ed., Supp. IV). See S. Rep. No. 92–743, *supra*, at 19–21. Since the very reason for withholding approval of a state law and providing an alternative federal forum is lack of "substantial equivalence" between the state-law provisions and the "standards established under part B," including the rebuttal limitation in § 411 (c)(4), it would be anomalous if the substitute federal forum could employ evidentiary rules which deviate substantially from those in Part B.

The statutory language and legislative history simply will not yield such an unlikely result. The phrase "to the extent appropriate" in § 430, 30 U. S. C. § 940 (1970 ed., Supp. IV), plainly refers to language in Part B which has no relevance to Part C, notably the language that specifies that "the Secretary [of Health, Education, and Welfare]" is to have certain adjudicative responsibilities. These are the references that are not "appropriate" under Part C, because Part C transfers adjudicative responsibilities to the States or, in the alternative,

to the Secretary of Labor. The obvious purpose of the phrase "to the extent appropriate" is to accommodate minor linguistic variations resulting from this transfer of responsibility. Thus, the interaction of the phrase "to the extent appropriate" and the reference to "the Secretary" in the rebuttal limitation of § 411 (c)(4) does not render the entire limitation "inappropriate" to Part C proceedings; it merely renders the reference to "the Secretary" inappropriate under Part C.

It is significant that the Court's interpretation of § 411 (c)(4)'s rebuttal limitation is not urged or even suggested by any party to this suit. The Federal Parties' position is that the District Court erred by reading § 411 (c)(4) to foreclose a showing that would refute total disability. That position is clearly correct. The § 411 (c)(4) presumption comes into play only after the claimant establishes total disability. See § 411 (c)(4), 30 U. S. C. § 921 (c)(4) (1970 ed., Supp. IV) ("and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption . . ."). In addition, the District Court ruled that § 411 (c)(4) places upon a specific coal mine owner the burden of proving that the respiratory or pulmonary disease did not arise out of coal mine employment. The Federal Parties urge that this construction is erroneous, because it overlooks the fact that under § 422 (c), 30 U. S. C. § 932 (c), a specific operator can also defeat liability by showing that the disability did not arise, even in part, out of employment in his mine during the period when he operated it. Again, the Federal Parties are clearly correct. If the operator makes the § 422 (c) showing, then the § 411 (c)(4) presumption—and the rebuttal limitation—is irrelevant. Accordingly, I would reverse the District Court's ruling that the § 411 (c)(4) rebuttal limitation violates the Constitution.

# PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. *v.* DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

No. 74–1151. Argued March 23, 1976—Decided July 1, 1976*

Two Missouri-licensed physicians, one of whom performs abortions at hospitals and the other of whom supervises abortions at Planned Parenthood, a not-for-profit corporation, brought suit, along with that organization, for injunctive and declaratory relief challenging the constitutionality of the Missouri abortion statute. The provisions under attack are: § 2 (2), defining "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems"; § 3 (2), requiring that before submitting to an abortion during the first 12 weeks of pregnancy a woman must consent in writing to the procedure and certify that "her consent is informed and freely given and is not the result of coercion"; § 3 (3), requiring, for the same period, the written consent of the spouse of a woman seeking an abortion unless a licensed physician certifies that the abortion is necessary to preserve the mother's life; § 3 (4), requiring, for the same period, and with the same proviso, the written consent of a parent or person *in loco parentis* to the abortion of an unmarried woman under age 18; § 6 (1), requiring the physician to exercise professional care to preserve the fetus' life and health, failing which he is deemed guilty of manslaughter and is liable in an action for damages; § 7, declaring an infant who survives an attempted abortion not performed to save the mother's life or health an abandoned ward of the State, and depriving the mother and a consenting father of parental rights; § 9, prohibiting after the first 12 weeks of pregnancy the abortion procedure of saline amniocentesis as "deleterious to maternal health"; and §§ 10 and 11, prescribing reporting and recordkeeping

*Together with No. 74–1419, *Danforth, Attorney General of Missouri* v. *Planned Parenthood of Central Missouri et al.*, also on appeal from the same court.

requirements for health facilities and physicians performing abortions. The District Court ruled that the two physicians had "obvious standing" to maintain the suit and that it was therefore unnecessary to determine if Planned Parenthood also had standing. On the merits, the court upheld the foregoing provisions with the exception of § 6 (1)'s professional-skill requirement, which was held to be "unconstitutionally overbroad" because it failed to exclude the pregnancy stage prior to viability. *Held:*

1. The physician-appellants have standing to challenge the foregoing provisions of the Act with the exception of § 7, the constitutionality of which the Court declines to decide. *Doe* v. *Bolton*, 410 U. S. 179. P. 62, and n. 2.

2. The definition of viability in § 2 (2) does not conflict with the definition in *Roe* v. *Wade*, 410 U. S. 113, 160, 163, as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and is presumably capable of "meaningful life outside the mother's womb." Section 2 (2) maintains the flexibility of the term "viability" recognized in *Roe*. It is not a proper legislative or judicial function to fix viability, which is essentially for the judgment of the responsible attending physician, at a specific point in the gestation period. Pp. 63–65.

3. The consent provision in § 3 (2) is not unconstitutional. The decision to abort is important and often stressful, and the awareness of the decision and its significance may be constitutionally assured by the State to the extent of requiring the woman's prior written consent. Pp. 65–67.

4. The spousal consent provision in § 3 (3), which does not comport with the standards enunciated in *Roe* v. *Wade*, *supra*, at 164–165, is unconstitutional, since the State cannot " 'delegate to a spouse a veto power which the [S]tate itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.' " Pp. 67–72.

5. The State may not constitutionally impose a blanket parental consent requirement, such as § 3 (4), as a condition for an unmarried minor's abortion during the first 12 weeks of her pregnancy for substantially the same reasons as in the case of the spousal consent provision, there being no significant state interests, whether to safeguard the family unit and parental authority or otherwise, in conditioning an abortion on the consent of a parent with respect to the under-18-year-old pregnant minor. As stressed in *Roe*, "the abortion decision and its effectuation must

be left to the medical judgment of the pregnant woman's attending physician." 410 U. S., at 164. Pp. 72–75.

6. Through § 9 the State would prohibit the most commonly used abortion procedure in the country and one that is safer, with respect to maternal mortality, than even the continuation of pregnancy until normal childbirth and would force pregnancy terminations by methods more dangerous to the woman's health than the method outlawed. As so viewed (particularly since another safe technique, prostaglandin, is not yet available) the outright legislative proscription of saline amniocentesis fails as a reasonable protection of maternal health. As an arbitrary regulation designed to prevent the vast majority of abortions after the first 12 weeks, it is plainly unconstitutional. Pp. 75–79.

7. The reporting and recordkeeping requirements, which can be useful to the State's interest in protecting the health of its female citizens and which may be of medical value, are not constitutionally offensive in themselves, particularly in view of reasonable confidentiality and retention provisions. They thus do not interfere with the abortion decision or the physician-patient relationship. It is assumed that the provisions will not be administered in an unduly burdensome way and that patients will not be required to execute spousal or parental consent forms in accordance with invalid provisions of the Act. Pp. 79–81.

8. The first sentence of § 6 (1) impermissibly requires a physician to preserve the *fetus'* life and health, whatever the stage of pregnancy. The second sentence, which provides for criminal and civil liability where a physician fails "to take such measures to encourage or to sustain the life of the *child*, and the death of the *child* results," does not alter the duty imposed by the first sentence or limit that duty to pregnancies that have reached the stage of viability, and since it is inseparably tied to the first provision, the whole section is invalid. Pp. 81–84.

392 F. Supp. 1362, affirmed in part, reversed in part, and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined, in all but Parts IV–D and IV–E of which STEVENS, J., joined, and in all but Parts IV–C, IV–D, IV–E, and IV–G of which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 89. WHITE, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 92. STEVENS, J.,

filed an opinion concurring in part and dissenting in part, *post*, p. 101.

*Frank Susman* argued the cause for appellants in No. 74–1151 and for appellees in No. 74–1419. With him on the brief was *Judith Mears*.

*John C. Danforth, pro se*, Attorney General of Missouri, argued the cause for appellees in No. 74–1151 and for appellant in No. 74–1419. With him on the brief were *D. Brook Bartlett*, First Assistant Attorney General, and *Karen M. Iverson* and *Christopher R. Brewster*, Assistant Attorneys General.†

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case is a logical and anticipated corollary to *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), for it raises issues secondary to those that were then before the Court. Indeed, some of the questions now presented were forecast and reserved in *Roe* and *Doe*. 410 U. S., at 165 n. 67.

## I

After the decisions in *Roe* and *Doe*, this Court remanded for reconsideration a pending Missouri federal case in which the State's then-existing abortion legisla-

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†*Rhonda Copelon* and *Nancy Stearns* filed a brief in both cases for the Center for Constitutional Rights et al. as *amici curiae* urging reversal in No. 74–1151.

Briefs of *amici curiae* were filed in both cases by *Eugene Krasicky*, *George E. Reed*, and *Patrick F. Geary* for the United States Catholic Conference; and by *Harriet F. Pilpel* for Planned Parenthood Federation of America, Inc., et al. Briefs of *amici curiae* were filed in No. 74–1151 by *John J. Donnelly* for Lawyers for Life, Inc., et al., and by *Jerome M. McLaughlin* for Missouri Nurses for Life.

tion, Mo. Rev. Stat. §§ 559.100, 542.380, and 563.300 (1969), was under constitutional challenge. *Rodgers* v. *Danforth*, 410 U. S. 949 (1973). A three-judge federal court for the Western District of Missouri, in an unreported decision, thereafter declared the challenged Missouri statutes unconstitutional and granted injunctive relief. On appeal here, that judgment was summarily affirmed. *Danforth* v. *Rodgers*, 414 U. S. 1035 (1973).

In June 1974, somewhat more than a year after *Roe* and *Doe* had been decided, Missouri's 77th General Assembly, in its Second Regular Session, enacted House Committee Substitute for House Bill No. 1211 (hereinafter Act). The legislation was approved by the Governor on June 14, 1974, and became effective immediately by reason of an emergency clause contained in § A of the statute. The Act is set forth in full as the Appendix to this opinion. It imposes a structure for the control and regulation of abortions in Missouri during all stages of pregnancy.

II

Three days after the Act became effective, the present litigation was instituted in the United States District Court for the Eastern District of Missouri. The plaintiffs are Planned Parenthood of Central Missouri, a not-for-profit Missouri corporation which maintains a facility in Columbia, Mo., for the performance of abortions; David Hall, M. D.; and Michael Freiman, M. D. Doctor Hall is a resident of Columbia, is licensed as a physician in Missouri, is chairman of the Department and Professor of Obstetrics and Gynecology at the University of Missouri Medical School at Columbia, and supervises abortions at the Planned Parenthood facility. He was described by the three-judge court in the 1973 case as one of four plaintiffs who were "eminent, Missouri-licensed obstetricians and gynecologists." Jurisdictional

Statement, App. A7, in *Danforth* v. *Rodgers,* No. 73–426, O. T. 1973. Doctor Freiman is a resident of St. Louis, is licensed as a physician in Missouri, is an instructor of Clinical Obstetrics and Gynecology at Washington University Medical School, and performs abortions at two St. Louis hospitals and at a clinic in that city.

The named defendants are the Attorney General of Missouri and the Circuit Attorney of the city of St. Louis "in his representative capacity" and "as the representative of the class of all similar Prosecuting Attorneys of the various counties of the State of Missouri." Complaint 10.

The plaintiffs brought the action on their own behalf and, purportedly, "on behalf of the entire class consisting of duly licensed physicians and surgeons presently performing or desiring to perform the termination of pregnancies and on behalf of the entire class consisting of their patients desiring the termination of pregnancy, all within the State of Missouri." *Id.,* at 9. Plaintiffs sought declaratory relief and also sought to enjoin enforcement of the Act on the ground, among others, that certain of its provisions deprived them and their patients of various constitutional rights: "the right to privacy in the physician-patient relationship"; the physicians' "right to practice medicine according to the highest standards of medical practice"; the female patients' right to determine whether to bear children; the patients' "right to life due to the inherent risk involved in childbirth" or in medical procedures alternative to abortion; the physicians' "right to give and plaintiffs' patients' right to receive safe and adequate medical advice and treatment, pertaining to the decision of whether to carry a given pregnancy to term and the method of termination"; the patients' right under the Eighth Amendment to be free from cruel and unusual punishment "by forcing

and coercing them to bear each pregnancy they conceive"; and, by being placed "in the position of decision making beset with . . . inherent possibiilities of bias and conflict of interest," the physician's right to due process of law guaranteed by the Fourteenth Amendment. *Id.*, at 10–11.

The particular provisions of the Act that remained under specific challenge at the end of trial were § 2 (2), defining the term "viability"; § 3 (2), requiring from the woman, prior to submitting to abortion during the first 12 weeks of pregnancy, a certification in writing that she consents to the procedure and "that her consent is informed and freely given and is not the result of coercion"; § 3 (3), requiring, for the same period, "the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother"; § 3 (4), requiring, for the same period, "the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother"; § 6 (1), requiring the physician to exercise professional care "to preserve the life and health of the fetus" and, failing such, deeming him guilty of manslaughter and making him liable in an action for damages; § 7, declaring an infant, who survives "an attempted abortion which was not performed to save the life or health of the mother," to be "an abandoned ward of the state under the jurisdiction of the juvenile court," and depriving the mother, and also the father if he consented to the abortion, of parental rights; § 9, the legislative finding that the method of abortion known as saline amniocentesis "is deleterious to maternal health," and prohibiting that method after the first 12 weeks of pregnancy; and §§ 10

and 11, imposing reporting and maintenance of record requirements for health facilities and for physicians who perform abortions.

The case was presented to a three-judge District Court convened pursuant to the provisions of 28 U. S. C. §§ 2281 and 2284. 392 F. Supp. 1362 (1975). The court ruled that the two physician-plaintiffs had standing inasmuch as § 6 (1) provides that the physician who fails to exercise the prescribed standard of professional care due the fetus in the abortion procedure shall be guilty of manslaughter, and § 14 provides that any person who performs or aids in the performance of an abortion contrary to the provisions of the Act shall be guilty of a misdemeanor. 392 F. Supp., at 1366–1367. Due to this "obvious standing" of the two physicians, *id.*, at 1367, the court deemed it unnecessary to determine whether Planned Parenthood also had standing.

On the issues as to the constitutionality of the several challenged sections of the Act, the District Court, largely by a divided vote, ruled that all except the first sentence of § 6 (1) withstood the attack. That sentence was held to be constitutionally impermissible because it imposed upon the physician the duty to exercise at all stages of pregnancy "that degree of professional skill, care and diligence to preserve the life and health of the fetus" that "would be required . . . to preserve the life and health of any fetus intended to be born." Inasmuch as this failed to exclude the stage of pregnancy prior to viability, the provision was "unconstitutionally overbroad." 392 F. Supp., at 1371.

One judge concurred in part and dissented in part. *Id.*, at 1374. He agreed with the majority as to the constitutionality of §§ 2 (2), 3 (2), 10, and 11, respectively relating to the definition of "viability," the woman's prior written consent, maintenance of records,

and retention of records. He also agreed with the majority that § 6 (1) was unconstitutionally overbroad. He dissented from the majority opinion upholding the constitutionality of §§ 3 (3), 3 (4), 7, and 9, relating, respectively, to spousal consent, parental consent, the termination of parental rights, and the proscription of saline amniocentesis.

In No. 74–1151, the plaintiffs appeal from that part of the District Court's judgment upholding sections of the Act as constitutional and denying injunctive relief against their application and enforcement. In No. 74–1419, the defendant Attorney General cross-appeals from that part of the judgment holding § 6 (1) unconstitutional and enjoining enforcement thereof. We granted the plaintiffs' application for stay of enforcement of the Act pending appeal. 420 U. S. 918 (1975). Probable jurisdiction of both appeals thereafter was noted. 423 U. S. 819 (1975).

For convenience, we shall usually refer to the plaintiffs as "appellants" and to both named defendants as "appellees."

## III

In *Roe* v. *Wade* the Court concluded that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U. S., at 153. It emphatically rejected, however, the proffered argument "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Ibid.* Instead,

this right "must be considered against important state interests in regulation." *Id.*, at 154.

The Court went on to say that the "pregnant woman cannot be isolated in her privacy," for she "carries an embryo and, later, a fetus." *Id.*, at 159. It was therefore "reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Ibid.* The Court stressed the measure of the State's interest in "the light of present medical knowledge." *Id.*, at 163. It concluded that the permissibility of state regulation was to be viewed in three stages: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," without interference from the State. *Id.*, at 164. The participation by the attending physician in the abortion decision, and his responsibility in that decision, thus, were emphasized. After the first stage, as so described, the State may, if it chooses, reasonably regulate the abortion procedure to preserve and protect maternal health. *Ibid.* Finally, for the stage subsequent to viability, a point purposefully left flexible for professional determination, and dependent upon developing medical skill and technical ability,[1] the State may regulate an abortion to protect the life of the fetus and even may proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.*, at 163–165.

[1] "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Roe* v. *Wade*, 410 U. S., at 160.

## IV

With the exception specified in n. 2, *infra*, we agree with the District Court that the physician-appellants clearly have standing. This was established in *Doe* v. *Bolton*, 410 U. S., at 188. Like the Georgia statutes challenged in that case, "[t]he physician is the one against whom [the Missouri Act] directly operate[s] in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." [2] *Ibid.*

Our primary task, then, is to consider each of the

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[2] This is not so, however, with respect to § 7 of the Act pertaining to state wardship of a live-born infant. Section 7 applies "where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother." It then provides that the infant "shall be an abandoned ward of the state" and that the mother—and the father, too, if he consented to the abortion—"shall have no parental rights or obligations whatsoever relating to such infant."

The physician-appellants do not contend that this section of the Act imposes any obligation on them or that its operation otherwise injures them in fact. They do not claim any interest in the question of who receives custody that is "sufficiently concrete" to satisfy the "case or controversy" requirement of a federal court's Art. III jurisdiction. *Singleton* v. *Wulff*, *post*, at 112. Accordingly, the physician-appellants do not have standing to challenge § 7 of the Act.

The District Court did not decide whether Planned Parenthood has standing to challenge the Act, or any portion of it, because of its view that the physician-appellants have standing to challenge the entire Act. 392 F. Supp. 1362, 1366–1367 (1975). We decline to consider here the standing of Planned Parenthood to attack § 7. That question appropriately may be left to the District Court for reconsideration on remand. As a consequence, we do not decide the issue of § 7's constitutionality.

challenged provisions of the new Missouri abortion statute in the particular light of the opinions and decisions in *Roe* and in *Doe*. To this we now turn, with the assistance of helpful briefs from both sides and from some of the *amici*.

A

*The definition of viability.* Section 2 (2) of the Act defines "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." Appellants claim that this definition violates and conflicts with the discussion of viability in our opinion in *Roe*. 410 U. S., at 160, 163. In particular, appellants object to the failure of the definition to contain any reference to a gestational time period, to its failure to incorporate and reflect the three stages of pregnancy, to the presence of the word "indefinitely," and to the extra burden of regulation imposed. It is suggested that the definition expands the Court's definition of viability, as expressed in *Roe*, and amounts to a legislative determination of what is properly a matter for medical judgment. It is said that the "mere possibility of momentary survival is not the medical standard of viability." Brief for Appellants 67.

In *Roe*, we used the term "viable," properly we thought, to signify the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and presumably capable of "meaningful life outside the mother's womb," 410 U. S., at 160, 163. We noted that this point "is usually placed" at about seven months or 28 weeks, but may occur earlier. *Id.*, at 160.

We agree with the District Court and conclude that the definition of viability in the Act does not conflict with what was said and held in *Roe*. In fact, we believe that

§ 2 (2), even when read in conjunction with § 5 (proscribing an abortion "not necessary to preserve the life or health of the mother . . . unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable"), the constitutionality of which is not explicitly challenged here, reflects an attempt on the part of the Missouri General Assembly to comply with our observations and discussion in *Roe* relating to viability. Appellant Hall, in his deposition, had no particular difficulty with the statutory definition.[3] As noted above, we recognized in *Roe* that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term. Section 2 (2) does the same. Indeed, one might argue, as the appellees do, that the presence of the statute's words "continued indefinitely" favor, rather than disfavor, the appellants, for, arguably, the point when life can be "continued indefinitely outside the womb" may well occur later in pregnancy than the point where the fetus is "potentially able to live outside the mother's womb." *Roe* v. *Wade,* 410 U. S., at 160.

In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician. The definition of viability in § 2 (2) merely reflects this fact. The appellees do not contend otherwise, for they insist

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[3] "[A]lthough I agree with the definition of 'viability,' I think that it must be understood that viability is a very difficult state to assess." Tr. 369.

that the determination of viability rests with the physician in the exercise of his professional judgment.[4]

We thus do not accept appellants' contention that a specified number of weeks in pregnancy must be fixed by statute as the point of viability. See *Wolfe* v. *Schroering*, 388 F. Supp. 631, 637 (WD Ky. 1974); *Hodgson* v. *Anderson*, 378 F. Supp. 1008, 1016 (Minn. 1974), dismissed for want of jurisdiction *sub nom. Spannaus* v. *Hodgson*, 420 U. S. 903 (1975).[5]

We conclude that the definition in § 2 (2) of the Act does not circumvent the limitations on state regulation outlined in *Roe*. We therefore hold that the Act's definition of "viability" comports with *Roe* and withstands the constitutional attack made upon it in this litigation.

B

*The woman's consent.* Under § 3 (2) of the Act, a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, must certify in writing her consent to the procedure and "that her consent is informed and freely given and is not the result of coercion." Appellants argue that this requirement is violative of

[4] "The determination of when the fetus is viable rests, as it should, with the physician, in the exercise of his medical judgment, on a case-by-case basis." Brief for Appellee Danforth 26. "Because viability may vary from patient to patient and with advancements in medical technology, it is essential that physicians make the determination in the exercise of their medical judgment." *Id.*, at 28. "Defendant agrees that 'viability' will vary, that it is a difficult state to assess . . . and that it must be left to the physician's judgment." *Id.*, at 29.

[5] The Minnesota statute under attack in *Hodgson* provided that a fetus "shall be considered potentially 'viable'" during the second half of its gestation period. Noting that the defendants had presented no evidence of viability at 20 weeks, the three-judge District Court held that that definition of viability was "unreasonable and cannot stand." 378 F. Supp., at 1016.

*Roe* v. *Wade*, 410 U. S., at 164–165, by imposing an extra layer and burden of regulation on the abortion decision. See *Doe* v. *Bolton*, 410 U. S., at 195–200. Appellants also claim that the provision is overbroad and vague.

The District Court's majority relied on the propositions that the decision to terminate a pregnancy, of course, "is often a stressful one," and that the consent requirement of § 3 (2) "insures that the pregnant woman retains control over the discretions of her consulting physician." 392 F. Supp., at 1368, 1369. The majority also felt that the consent requirement "does not single out the abortion procedure, but merely includes it within the category of medical operations for which consent is required." [6] *Id.*, at 1369. The third judge joined the majority in upholding § 3 (2), but added that the written consent requirement was "not burdensome or chilling" and manifested "a legitimate interest of the state that this important decision has in fact been made by the person constitutionally empowered to do so." 392 F. Supp., at 1374. He went on to observe that the requirement "in no way interposes the state or third parties in the decision-making process." *Id.*, at 1375.

We do not disagree with the result reached by the District Court as to § 3 (2). It is true that *Doe* and *Roe* clearly establish that the State may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy. Despite the fact that apparently no other Missouri statute, with the exceptions referred to in n. 6, *supra*, requires a

[6] Apparently, however, the only other Missouri statutes concerned with consent for general medical or surgical care relate to persons committed to the Missouri State chest hospital, Mo. Rev. Stat. § 199.240 (Supp. 1975), or to mental or correctional institutions, § 105.700 (1969).

patient's prior written consent to a surgical procedure,[7] the imposition by § 3 (2) of such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.[8]

C

*The spouse's consent.* Section 3 (3) requires the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless

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[7] There is some testimony in the record to the effect that taking from the patient a prior written consent to surgery is the custom. That may be so in some areas of Missouri, but we definitely refrain from characterizing it extremely as "the universal practice of the medical profession," as the appellees do. Brief for Appellee Danforth 32.

[8] The appellants' vagueness argument centers on the word "informed." One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who composed the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

"the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother." [9]

The appellees defend § 3 (3) on the ground that it was enacted in the light of the General Assembly's "perception of marriage as an institution," Brief for Appellee Danforth 34, and that any major change in family status is a decision to be made jointly by the marriage partners. Reference is made to an abortion's possible effect on the woman's childbearing potential. It is said that marriage always has entailed some legislatively imposed limitations: Reference is made to adultery and bigamy as criminal offenses; to Missouri's general requirement, Mo. Rev. Stat. § 453.030.3 (1969), that for an adoption of a child born in wedlock the consent of both parents is necessary; to similar joint-consent requirements imposed by a number of States with respect to artificial insemination and the legitimacy of children so conceived; to the laws of two States requiring spousal consent for voluntary sterilization; and to the long-established requirement of spousal consent for the effective disposition of an interest in real property. It is argued that "[r]ecognizing that the consent of both parties is generally necessary . . . to begin a family, the legislature has determined that a change in the family structure set in motion by mutual consent should be terminated only by mutual consent," Brief for Appellee Danforth 38, and that what the legislature did was to exercise its inherent policy-making power "for what was believed to be in the best interests of all the people of Missouri." *Id.*, at 40.

The appellants, on the other hand, contend that § 3 (3) obviously is designed to afford the husband the right unilaterally to prevent or veto an abortion, whether or

[9] It is of some interest to note that the condition does not relate, as most statutory conditions in this area do, to the preservation of the life or *health* of the mother.

not he is the father of the fetus, and that this not only violates *Roe* and *Doe* but is also in conflict with other decided cases. See, *e. g., Poe* v. *Gerstein,* 517 F. 2d 787, 794–796 (CA5 1975), appeal docketed, No. 75–713; *Wolfe* v. *Schroering,* 388 F. Supp., at 636–637; *Doe* v. *Rampton,* 366 F. Supp. 189, 193 (Utah 1973). They also refer to the situation where the husband's consent cannot be obtained because he cannot be located. And they assert that § 3 (3) is vague and overbroad.

In *Roe* and *Doe* we specifically reserved decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed. 410 U. S., at 165 n. 67. We now hold that the State may not constitutionally require the consent of the spouse, as is specified under § 3 (3) of the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy. We thus agree with the dissenting judge in the present case, and with the courts whose decisions are cited above, that the State cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." 392 F. Supp., at 1375. Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. See, *e. g., Griswold* v. *Connecticut,* 381 U. S. 479, 486 (1965); *Maynard* v. *Hill,* 125 U. S.

190, 211 (1888).[10] Moreover, we recognize that the decision whether to undergo or to forgo an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right. See *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972).[11]

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[10] "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Griswold* v. *Connecticut*, 381 U. S., at 486.

[11] As the Court recognized in *Eisenstadt* v. *Baird*, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U. S., at 453 (emphasis in original).

The dissenting opinion of our Brother WHITE appears to overlook the implications of this statement upon the issue whether § 3 (3) is constitutional. This section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination not only may discourage the consultation that might normally be expected to precede a major decision affecting the marital couple but also, and more importantly,

It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship." 392 F. Supp., at 1370.

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. Cf. *Roe* v. *Wade*, 410 U. S., at 153.

We conclude that § 3 (3) of the Missouri Act is inconsistent with the standards enunciated in *Roe* v. *Wade*, 410 U. S., at 164–165, and is unconstitutional. It is therefore unnecessary for us to consider the appellants'

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the State has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

additional challenges to § 3 (3) based on vagueness and overbreadth.

D

*Parental Consent.* Section 3 (4) requires, with respect to the first 12 weeks of pregnancy, where the woman is unmarried and under the age of 18 years, the written consent of a parent or person *in loco parentis* unless, again, "the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother." It is to be observed that only one parent need consent.

The appellees defend the statute in several ways. They point out that the law properly may subject minors to more stringent limitations than are permissible with respect to adults, and they cite, among other cases, *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), and *McKeiver* v. *Pennsylvania,* 403 U. S. 528 (1971). Missouri law, it is said, "is replete with provisions reflecting the interest of the state in assuring the welfare of minors," citing statutes relating to a guardian *ad litem* for a court proceeding, to the care of delinquent and neglected children, to child labor, and to compulsory education. Brief for Appellee Danforth 42. Certain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public, citing statutes proscribing the sale of firearms and deadly weapons to minors without parental consent, and other statutes relating to minors' exposure to certain types of literature, the purchase by pawnbrokers of property from minors, and the sale of cigarettes and alcoholic beverages to minors. It is pointed out that the record contains testimony to the effect that children of tender years (even ages 10 and 11) have sought abortions. Thus, a State's permitting a child to obtain an abortion without the counsel of an adult "who has responsi-

bility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors." *Id.*, at 44. Parental discretion, too, has been protected from unwarranted or unreasonable interference from the State, citing *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). Finally, it is said that § 3 (4) imposes no additional burden on the physician because even prior to the passage of the Act the physician would require parental consent before performing an abortion on a minor.

The appellants, in their turn, emphasize that no other Missouri statute specifically requires the additional consent of a minor's parent for medical or surgical treatment, and that in Missouri a minor legally may consent to medical services for pregnancy (excluding abortion), venereal disease, and drug abuse. Mo. Rev. Stat. §§ 431.061–431.063 (Supp. 1975). The result of § 3 (4), it is said, "is the ultimate supremacy of the parents' desires over those of the minor child, the pregnant patient." Brief for Appellants 93. It is noted that in Missouri a woman under the age of 18 who marries with parental consent does not require parental consent to abort, and yet her contemporary who has chosen not to marry must obtain parental approval.

The District Court majority recognized that, in contrast to § 3 (3), the State's interest in protecting the mutuality of a marriage relationship is not present with respect to § 3 (4). It found "a compelling basis," however, in the State's interest "in safeguarding the authority of the family relationship." 392 F. Supp., at 1370. The dissenting judge observed that one could not seriously argue that a minor must submit to an abortion if her parents insist, and he could not see "why she would not be entitled to the same right of self-determination now

explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician." *Id.*, at 1376.

Of course, much of what has been said above, with respect to § 3 (3), applies with equal force to § 3 (4). Other courts that have considered the parental-consent issue in the light of *Roe* and *Doe*, have concluded that a statute like § 3 (4) does not withstand constitutional scrutiny. See, *e. g.*, *Poe* v. *Gerstein*, 517 F. 2d, at 792; *Wolfe* v. *Schroering*, 388 F. Supp., at 636–637; *Doe* v. *Rampton*, 366 F. Supp., at 193, 199; *State* v. *Koome*, 84 Wash. 2d 901, 530 P. 2d 260 (1975).

We agree with appellants and with the courts whose decisions have just been cited that the State may not impose a blanket provision, such as § 3 (4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, *e. g.*, *Breed* v. *Jones*, 421 U. S. 519 (1975); *Goss* v. *Lopez*, 419 U. S. 565 (1975); *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *In re Gault*, 387 U. S. 1 (1967). The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.

*Prince* v. *Massachusetts,* 321 U. S., at 170; *Ginsberg* v. *New York,* 390 U. S. 629 (1968). It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.

One suggested interest is the safeguarding of the family unit and of parental authority. 392 F. Supp., at 1370. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant. (or immature enough)

We emphasize that our holding that § 3 (4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. See *Bellotti* v. *Baird, post,* p. 132. The fault with § 3 (4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction. It violates the strictures of *Roe* and *Doe.*

E

*Saline amniocentesis.* Section 9 of the statute prohibits the use of saline amniocentesis, as a method or technique of abortion, after the first 12 weeks of preg-

nancy. It describes the method as one whereby the amniotic fluid is withdrawn and "a saline or other fluid" is inserted into the amniotic sac. The statute imposes this proscription on the ground that the technique "is deleterious to maternal health," and places it in the form of a legislative finding. Appellants challenge this provision on the ground that it operates to preclude virtually all abortions after the first trimester. This is so, it is claimed, because a substantial percentage, in the neighborhood of 70% according to the testimony, of all abortions performed in the United States after the first trimester are effected through the procedure of saline amniocentesis. Appellants stress the fact that the alternative methods of hysterotomy and hysterectomy are significantly more dangerous and critical for the woman than the saline technique; they also point out that the mortality rate for normal childbirth exceeds that where saline amniocentesis is employed. Finally, appellants note that the perhaps safer alternative of prostaglandin instillation, suggested and strongly relied upon by the appellees, at least at the time of the trial, is not yet widely used in this country.

We held in *Roe* that after the first stage, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." 410 U. S., at 164. The question with respect to § 9 therefore is whether the flat prohibition of saline amniocentesis is a restriction which "reasonably relates to the preservation and protection of maternal health." *Id.*, at 163. The appellees urge that what the Missouri General Assembly has done here is consistent with that guideline and is buttressed by substantial supporting medical evidence in the record to which this Court should defer.

The District Court's majority determined, on the basis of the evidence before it, that the maternal mortality rate in childbirth does, indeed, exceed the mortality rate where saline amniocentesis is used. Therefore, the majority acknowledged, § 9 could be upheld only if there were safe alternative methods of inducing abortion after the first 12 weeks. 392 F. Supp., at 1373. Referring to such methods as hysterotomy, hysterectomy, "mechanical means of inducing abortion," and prostaglandin injection, the majority said that at least the latter two techniques were safer than saline. Consequently, the majority concluded, the restriction in § 9 could be upheld as reasonably related to maternal health.

We feel that the majority, in reaching its conclusion, failed to appreciate and to consider several significant facts. First, it did not recognize the prevalence, as the record conclusively demonstrates, of the use of saline amniocentesis as an accepted medical procedure in this country; the procedure, as noted above, is employed in a substantial majority (the testimony from both sides ranges from 68% to 80%) of all post-first-trimester abortions. Second, it failed to recognize that at the time of trial, there were severe limitations on the availability of the prostaglandin technique, which, although promising, was used only on an experimental basis until less than two years before. See *Wolfe* v. *Schroering*, 388 F. Supp., at 637, where it was said that at that time (1974), there were "no physicians in Kentucky competent in the technique of prostaglandin amnio infusion." And appellees offered no evidence that prostaglandin abortions were available in Missouri.[12] Third, the statute's

[12] In response to MR. JUSTICE WHITE's criticism that the prostaglandin method of inducing abortion was available in Missouri, either at the time the Act was passed or at the time of trial, we make the following observations. First, there is no evidence in the record

reference to the insertion of "a saline or other fluid" appears to include within its proscription the intra-amniotic injection of prostaglandin itself and other methods that may be developed in the future and that may prove highly effective and completely safe. Finally, the majority did not consider the anomaly inherent in § 9 when it proscribes the use of saline but does not prohibit techniques that are many times more likely to result in maternal death. See 392 F. Supp., at 1378 n. 8 (dissenting opinion).

These unappreciated or overlooked factors place the State's decision to bar use of the saline method in a completely different light. The State, through § 9, would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth. More-

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to which our Brother has pointed that demonstrates that the prostaglandin method was or is available in Missouri. Second, the evidence presented to the District Court does not support such a view. Until January 1974 prostaglandin was used only on an experimental basis in a few medical centers. And, at the time the Missouri General Assembly proscribed saline, the sole distributor of prostaglandin "restricted sales to around twenty medical centers from coast to coast." Brief for Appellee Danforth 68.

It is clear, therefore, that at the time the Missouri General Assembly passed the Act, prostaglandin was not available, in any meaningful sense of that term. Because of this undisputed fact, it was incumbent upon appellees to show that at the time of trial in 1974 prostaglandin was available. They failed to do so. Indeed, appellees' expert witness, on whose testimony the dissenting opinion relies, does not fill this void. He was able to state only that prostaglandin was used in a limited way until shortly before trial and that he "would think" that it was more readily available at the time of trial. Tr. 335. Such an experimental and limited use of prostaglandin throughout the country does not make it available or accessible to concerned persons in Missouri.

over, as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed.

As so viewed, particularly in the light of the present unavailability—as demonstrated by the record—of the prostaglandin technique, the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge. See *Wolfe* v. *Schroering*, 388 F. Supp., at 637.

F

*Recordkeeping.* Sections 10 and 11 of the Act impose recordkeeping requirements for health facilities and physicians concerned with abortions irrespective of the pregnancy stage. Under § 10, each such facility and physician is to be supplied with forms "the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law." The statute states that the information on the forms "shall be confidential and shall be used only for statistical purposes." The "records, however, may be inspected and health data acquired by local, state, or national public health officers." Under § 11 the records are to be kept for seven years in the permanent files of the health facility where the abortion was performed.

Appellants object to these reporting and recordkeeping provisions on the ground that they, too, impose an extra

layer and burden of regulation, and that they apply throughout all stages of pregnancy. All the judges of the District Court panel, however, viewed these provisions as statistical requirements "essential to the advancement of medical knowledge," and as nothing that would "restrict either the abortion decision itself or the exercise of medical judgment in performing an abortion." 392 F. Supp., at 1374.

One may concede that there are important and perhaps conflicting interests affected by recordkeeping requirements. On the one hand, maintenance of records indeed may be helpful in developing information pertinent to the preservation of maternal health. On the other hand, as we stated in *Roe,* during the first stage of pregnancy the State may impose no restrictions or regulations governing the medical judgment of the pregnant woman's attending physician with respect to the termination of her pregnancy. 410 U. S., at 163, 164. Furthermore, it is readily apparent that one reason for the recordkeeping requirement, namely, to assure that all abortions in Missouri are performed in accordance with the Act, fades somewhat into insignificance in view of our holding above as to spousal and parental consent requirements.

Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible. This surely is so for the period after the first stage of pregnancy, for then the State may enact substantive as well as recordkeeping regulations that are reasonable means of protecting maternal health. As to the first stage, one may argue forcefully, as the appellants do, that the State should not be able to impose any recordkeeping requirements that significantly differ from those imposed with respect to other,

and comparable, medical or surgical procedures. We conclude, however, that the provisions of §§ 10 and 11, while perhaps approaching impermissible limits, are not constitutionally offensive in themselves. Recordkeeping of this kind, if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment.[13] The added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits. As so regarded, we see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship. We naturally assume, furthermore, that these recordkeeping and record-maintaining provisions will be interpreted and enforced by Missouri's Division of Health in the light of our decision with respect to the Act's other provisions, and that, of course, they will not be utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction. Obviously, the State may not require execution of spousal and parental consent forms that have been invalidated today.

G

*Standard of care.* Appellee Danforth in No. 74–1419 appeals from the unanimous decision of the District

[13] We note that in Missouri physicians must participate in the reporting of births and deaths, Mo. Rev. Stat. §§ 193.100 and 193.140 (1969), and communicable diseases, §§ 192.020 and 192.040 (1969), and that their use of controlled substances is rigidly monitored by the State, §§ 195.010–195.545 (1969 and Supp. 1975).

Court that § 6 (1) of the Act is unconstitutional. That section provides:

> "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter . . . . Further, such physician or other person shall be liable in an action for damages."

The District Court held that the first sentence was unconstitutionally overbroad because it failed to exclude from its reach the stage of pregnancy prior to viability. 392 F. Supp., at 1371.

The Attorney General argues that the District Court's interpretation is erroneous and unnecessary. He claims that the first sentence of § 6 (1) establishes only the general standard of care that applies to the person who performs the abortion, and that the second sentence describes the circumstances when that standard of care applies, namely, when a live child results from the procedure. Thus, the first sentence, it is said, despite its reference to the fetus, has no application until a live birth results.

The appellants, of course, agree with the District Court. They take the position that § 6 (1) imposes its standard of care upon the person performing the abortion even though the procedure takes place before viability. They argue that the statute on its face effectively precludes abortion and was meant to do just that.

We see nothing that requires federal-court abstention on this issue. *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437–439 (1971); *Kusper* v. *Pontikes,* 414 U. S. 51, 54–55 (1973). And, like the three judges of the District Court, we are unable to accept the appellee's sophisticated interpretation of the statute. Section 6 (1) requires the physician to exercise the prescribed skill, care, and diligence to preserve the life and health of the *fetus.* It does not specify that such care need be taken only after the stage of viability has been reached. As the provision now reads, it impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of pregnancy. The fact that the second sentence of § 6 (1) refers to a criminal penalty where the physician fails "to take such measures to encourage or to sustain the life of the *child,* and the death of the *child* results" (emphasis supplied), simply does not modify the duty imposed by the previous sentence or limit that duty to pregnancies that have reached the stage of viability.

The appellees finally argue that if the first sentence of § 6 (1) does not survive constitutional attack, the second sentence does, and, under the Act's severability provision, § B, is severable from the first. The District Court's ruling of unconstitutionality, 392 F. Supp., at 1371, made specific reference to the first sentence, but its conclusion of law and its judgment invalidated all of § 6 (1). *Id.,* at 1374; Jurisdictional Statement A–34 in No. 74–1419. Appellee Danforth's motion to alter or amend the judgment, so far as the second sentence of § 6 (1) was concerned, was denied by the District Court. *Id.,* at A–39.

We conclude, as did the District Court, that § 6 (1) must stand or fall as a unit. Its provisions are inextricably bound together. And a physician's or other person's criminal failure to protect a liveborn infant surely

will be subject to prosecution in Missouri under the State's criminal statutes.

The judgment of the District Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

## APPENDIX TO OPINION OF THE COURT

### H. C. S. HOUSE BILL NO. 1211

AN ACT relating to abortion with penalty provisions and emergency clause.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) "Abortion," the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Viability," that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) "Physician," any person licensed to practice medi-

cine in this state by the state board of registration of the healing arts.

Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment.

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Section 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

Section 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who

shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.-140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant, shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

Section 9. The general assembly finds that the method or technique of abortion known as saline amnio-

centesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

Section 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri

rejected or revoked by the appropriate state licensing board.

Section 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

Section 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Section B. If any provision of this Act or the application thereof to any person or circumstance shall be

held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are declared to be severable.

Approved June 14, 1974.
Effective June 14, 1974.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, concurring.

While joining the Court's opinion, I write separately to indicate my understanding of some of the constitutional issues raised by this litigation.

With respect to the definition of viability in § 2 (2) of the Act, it seems to me that the critical consideration is that the statutory definition has almost no operative significance. The State has merely required physicians performing abortions to *certify* that the fetus to be aborted is not viable. While the physician may be punished for failing to issue a certification, he may not be punished for erroneously concluding that the fetus is not viable. There is thus little chance that a physician's professional decision to perform an abortion will be "chilled."

I agree with the Court that the patient-consent provision in § 3 (2) is constitutional. While § 3 (2) obviously regulates the abortion decision during all stages of pregnancy, including the first trimester, I do not believe it conflicts with the statement in *Roe* v. *Wade,* 410 U. S. 113, 163, that "for the period of pregnancy prior to [approximately the end of the first trimester] the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment

may be effectuated by an abortion free of interference by the State." That statement was made in the context of invalidating a state law aimed at thwarting a woman's decision to have an abortion. It was not intended to preclude the State from enacting a provision aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion.

As to the provision of the law that requires a husband's consent to an abortion, § 3 (3), the primary issue that it raises is whether the State may constitutionally recognize and give effect to a right on his part to participate in the decision to abort a jointly conceived child. This seems to me a rather more difficult problem than the Court acknowledges. Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom. See *Stanley* v. *Illinois*, 405 U. S. 645; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535. But the Court has recognized as well that the Constitution protects "a *woman's* decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, *supra*, at 153 (emphasis added). In assessing the constitutional validity of § 3 (3) we are called upon to choose between these competing rights. I agree with the Court that since "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance weighs in her favor." *Ante*, at 71.

With respect to the state law's requirement of parental consent, § 3 (4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti* v. *Baird*, *post*, at 147–148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases

but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.[1]

There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.[2]

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[1] For some of the considerations that support the State's interest in encouraging parental consent, see the opinion of MR. JUSTICE STEVENS, concurring in part and dissenting in part. *Post*, at 102–105.

[2] The mode of operation of one such clinic is revealed by the record in *Bellotti* v. *Baird*, *post*, p. 132, and accurately described by appellants in that case:

"The counseling . . . occurs entirely on the day the abortion is to be performed . . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . . The physician takes no part in this counseling process . . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . .

"The abortion itself takes five to seven minutes . . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician, . . . may be performing abortions on many other adults and minors . . . . On busy days patients are scheduled in separate groups, consisting

As to the constitutional validity of § 9 of the Act, prohibiting the use of the saline amniocentesis procedure, I agree fully with the views expressed by MR. JUSTICE STEVENS.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

In *Roe* v. *Wade,* 410 U. S. 113 (1973), this Court recognized a right to an abortion free from state prohibition. The task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process. However, even accepting *Roe* v. *Wade,* there is nothing in the opinion in that case and nothing articulated in the Court's opinion in this case which justifies the invalidation of four provisions of House Committee Substitute for House Bill No. 1211 (hereafter Act) enacted by the Missouri 77th General Assembly in 1974 in response to *Roe* v. *Wade.* Accordingly, I dissent, in part.

I

*Roe* v. *Wade, supra,* at 163, holds that until a fetus becomes viable, the interest of the State in the life or potential life it represents is outweighed by the interest of the mother in choosing "whether or not to terminate her pregnancy." 410 U. S., at 153. Section 3 (3) of the Act provides that a married woman may not obtain an abortion without her husband's consent. The Court strikes down this statute in one sentence. It says that "since the State cannot . . . proscribe abortion . . . the State cannot delegate authority to any particular person,

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usually of five patients . . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room . . . ." Brief for Appellants in No. 75–73, O. T. 1975, pp. 43–44.

even the spouse, to prevent abortion . . . ." *Ante*, at 69. But the State is not—under § 3 (3)—delegating to the husband the power to vindicate the *State's* interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife.[1] It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the *State's* interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life. See *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972), and cases there cited. It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe* v. *Wade*, *supra*. These are matters which a State should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.

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[1] There are countless situations in which the State prohibits conduct only when it is objected to by a private person most closely affected by it. Thus a State cannot forbid anyone to enter on private property with the owner's consent, but it may enact and enforce trespass laws against unauthorized entrances. It cannot forbid transfer of property held in tenancy by the entireties but it may require consent by both husband and wife to such a transfer. These situations plainly do not involve delegations of legislative power to private parties; and neither does the requirement in § 3 (3) that a woman not deprive her husband of his future child without his consent.

In describing the nature of a mother's interest in terminating a pregnancy, the Court in *Roe* v. *Wade* mentioned only the post-birth burdens of rearing a child, 410 U. S., at 153, and rejected a rule based on her interest in controlling her own body during pregnancy. *Id.*, at 154. Missouri has a law which prevents a woman from putting a child up for adoption over her husband's objection, Mo. Rev. Stat. § 453.030 (1969). This law represents a judgment by the State that the mother's interest in avoiding the burdens of child rearing do not outweigh or snuff out the father's interest in participating in bringing up his own child. That law is plainly valid, but no more so than § 3 (3) of the Act now before us, resting as it does on precisely the same judgment.

## II

Section 3 (4) requires that an unmarried woman under 18 years of age obtain the consent of a parent or a person *in loco parentis* as a condition to an abortion. Once again the Court strikes the provision down in a sentence. It states: "Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy . . . ." *Ante*, at 74. The Court rejects the notions that the *State* has an interest in strengthening the family unit, or that the *parent* has an "independent interest" in the abortion decision, sufficient to justify § 3 (4) and apparently concludes that the provision is therefore unconstitutional. But the purpose of the parental-consent requirement is not merely to vindicate any interest of the parent or of the State. The purpose of the requirement is to vindicate the very right created in *Roe* v. *Wade*, *supra*—the right of the pregnant woman to decide

"whether *or not* to terminate her pregnancy." 410 U. S., at 153 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; [2] and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

## III

Section 9 of the Act prohibits abortion by the method known as saline amniocentesis—a method used at the time the Act was passed for 70% of abortions performed after the first trimester. Legislative history reveals that the Missouri Legislature viewed saline amniocentesis as far less safe a method of abortion than the so-called prostaglandin method. The court below took evidence on the question and summarized it as follows:

> "The record of trial discloses that use of the saline method exposes a woman to the danger of severe complications, regardless of the skill of the physician or the precaution taken. Saline may cause one or

[2] As MR. JUSTICE STEVENS states in his separate opinion, *post*, at 102:

"The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant."

more of the following conditions: Disseminated intravascular coagulation or 'consumptive coagulapathy' (disruption of the blood clotting mechanism [Dr. Warren, Tr. 57–58; Dr. Klaus, Tr. 269–270; Dr. Anderson, Tr. 307; Defts' Exs. H & M]), which may result in severe bleeding and possibly death (Dr. Warren, Tr. 58); hypernatremia (increase in blood sodium level), which may lead to convulsions and death (Dr. Klaus, Tr. 268); and water intoxication (accumulated water in the body tissue which may occur when oxytoxin is used in conjunction with the injection of saline), resulting in damage to the central nervous system or death (Dr. Warren, Tr. 76; Dr. Klaus, Tr. 270–271; Dr. Anderson, Tr. 310; Defts' Ex. L). There is also evidence that saline amniocentesis causes massive tissue destruction to the inside of the uterus (Dr. Anderson, Tr. 308)." 392 F. Supp. 1362, 1372–1373 (1975).

The District Court also cited considerable evidence establishing that the prostaglandin method is safer. In fact, the Chief of Obstetrics at Yale University, Dr. Anderson, suggested that "physicians should be liable for malpractice if they chose saline over prostaglandin after having been given all the facts on both methods." *Id.*, at 1373. The Court nevertheless reverses the decision of the District Court sustaining § 9 against constitutional challenge. It does so apparently because saline amniocentesis was widely used before the Act was passed; because the prostaglandin method was seldom used and was not generally available; and because other abortion techniques more dangerous than saline amniocentesis were not banned. At bottom the majority's holding—as well as the concurrence—rests on its *factual* finding that the prostaglandin method is unavailable to the women of

Missouri. It therefore concludes that the ban on the saline method is "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks," *ante*, at 79. This factual finding was not made either by the majority or by the dissenting judge below. Appellants have not argued that the record below supports such a finding. In fact the record below does not support such a finding. There is *no* evidence in the record that women in Missouri will be unable to obtain abortions by the prostaglandin method. What evidence there is in the record on this question supports the contrary conclusion.[3] The record discloses that the prostaglandin method of abortion was the country's second most common method of abortion during the second trimester, Tr. 42, 89–90; that although the prostaglandin method had previously been available only on an experimental basis, it was, at the time of trial available in "small hospitals all over the country," *id.*, at 342; that in another year or so the prostaglandin method would become—even in the absence of legislation on the subject—the most prevalent method. Anderson deposition, at 69. Moreover, one doctor quite sensibly testified that if the saline method were banned, hospitals would quickly switch to the prostaglandin method.

The majority relies on the testimony of one doctor that—as already noted—prostaglandin had been available on an experimental basis only until January 1, 1974; and that its manufacturer, the Upjohn Co., restricted its sales to large medical centers for the following six months, after which sales were to be unrestricted. Tr.

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[3] The absence of more evidence on the subject in the record seems to be a result of the fact that the claim that the prostaglandin method is unavailable was not part of plaintiffs' litigating strategy below.

334–335. In what manner this evidence supports the proposition that prostaglandin is unavailable to the women of Missouri escapes me. The statute involved in this litigation was passed on June 14, 1974; evidence was taken in July 1974; the District Court's decree sustaining the ban on the saline method which this Court overturns was entered in January 1975; and this Court declares the statute unconstitutional in July 1976. There is simply no evidence in the record that prostaglandin was or is unavailable at any time relevant to this case. Without such evidence and without any factual finding by the court below this Court cannot properly strike down a statute passed by one of the States. Of course, there is no burden on a State to establish the constitutionality of one of its laws. Absent proof of a fact essential to its unconstitutionality, the statute remains in effect.

The only other basis for its factual finding which the majority offers is a citation to *another* case—*Wolfe* v. *Schroering*, 388 F. Supp. 631, 637 (WD Ky. 1974)—in which a different court concluded that the record in its case showed the prostaglandin method to be unavailable in another State—Kentucky—at another time—two years ago. This case must be decided on its own record. I am not yet prepared to accept the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion. The majority's finding of fact that women in Missouri will be unable to obtain abortions after the first trimester if the saline method is banned is wholly unjustifiable.

In any event, the point of § 9 is to change the practice under which most abortions were performed under the saline amniocentesis method and to make the safer prostaglandin method generally available. It promises to

achieve that result, if it remains operative, and the evidence discloses that the result is a desirable one or at least that the legislature could have so viewed it. That should end our inquiry, unless we purport to be not only the country's continuous constitutional convention but also its *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.

## IV

Section 6 (1) of the Act provides:

> "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter . . . . Further, such physician or other person shall be liable in an action for damages."

If this section is read in any way other than through a microscope, it is plainly intended to require that, where a "fetus [may have] the capability of meaningful life outside the mother's womb," *Roe* v. *Wade*, 410 U. S., at 163, the abortion be handled in a way which is designed to preserve that life notwithstanding the mother's desire to terminate it. Indeed, even looked at through a microscope the statute seems to go no further. It requires a physician to exercise "*that* degree of professional skill . . . to preserve the . . . fetus," which he would be required to exercise if the mother wanted a live child. Plainly,

if the pregnancy is to be terminated at a time when there is no chance of life outside the womb, a physician would not be required to exercise any care or skill to preserve the life of the fetus during abortion no matter what the mother's desires. The statute would appear then to operate only in the gray area after the fetus *might* be viable but while the physician is still able to certify "with reasonable medical certainty that the fetus is not viable." See § 5 of the Act which flatly prohibits abortions absent such a certification. Since the State has a compelling interest, sufficient to outweigh the mother's desire to kill the fetus, when the "fetus . . . has the capability of meaningful life outside the mother's womb," *Roe* v. *Wade, supra,* at 163, the statute is constitutional.

Incredibly, the Court reads the statute instead to require "the physician to preserve the life and health of the fetus, whatever the stage of pregnancy," *ante,* at 83, thereby attributing to the Missouri Legislature the strange intention of passing a statute with absolutely no chance of surviving constitutional challenge under *Roe* v. *Wade, supra.*

The Court compounds its error by also striking down as unseverable the wholly unobjectionable requirement in the second sentence of § 6 (1) that where an abortion produces a live child, steps must be taken to sustain its life. It explains its result in two sentences:

> "We conclude, as did the District Court, that § 6 (1) must stand or fall as a unit. Its provisions are inextricably bound together." *Ante,* at 83.

The question whether a constitutional provision of state law is severable from an unconstitutional provision is *entirely* a question of the intent of the state legislature. There is not the slightest reason to suppose that the Missouri Legislature would not require proper care

for live babies just because it cannot require physicians performing abortions to take care to preserve the life of fetuses. The Attorney General of Missouri has argued here that the *only* intent of § 6 (1) was to require physicians to support a live baby which resulted from an abortion.

At worst, § 6 (1) is ambiguous on both points and the District Court should be directed to abstain until a construction may be had from the state courts. Under no circumstances should § 6 (1) be declared unconstitutional at this point.[4]

V

I join the judgment and opinion of the Court insofar as it upholds the other portions of the Act against constitutional challenge.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

With the exception of Parts IV–D and IV–E, I join the Court's opinion.

In *Roe* v. *Wade,* 410 U. S. 113, the Court held that a woman's right to decide whether to abort a pregnancy is entitled to constitutional protection. That decision, which is now part of our law, answers the question discussed in Part IV–E of the Court's opinion, but merely poses the question decided in Part IV–D.

If two abortion procedures had been equally accessible to Missouri women, in my judgment the United States Constitution would not prevent the state legis-

[4] The majority's construction of state law is, of course, not binding on the Missouri courts. If they should disagree with the majority's reading of state law on one or both of the points treated by the majority, the State could validly enforce the relevant parts of the statute—at least against all those people not parties to this case. Cf. *Dombrowski* v. *Pfister,* 380 U. S. 479, 492 (1965).

lature from outlawing the one it found to be less safe even though its conclusion might not reflect a unanimous consensus of informed medical opinion. However, the record indicates that when the Missouri statute was enacted, a prohibition of the saline amniocentesis procedure was almost tantamount to a prohibition of any abortion in the State after the first 12 weeks of pregnancy. Such a prohibition is inconsistent with the essential holding of *Roe* v. *Wade* and therefore cannot stand.

In my opinion, however, the parental-consent requirement is consistent with the holding in *Roe*. The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe* v. *Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a

factory. It is not necessarily any more important than the decision to run away from home or the decision to marry. But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. Whatever choice a pregnant young woman makes—to marry, to abort, to bear her child out of wedlock—the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. Moreover, it is perfectly clear that the parental-consent requirement will necessarily involve a parent in the decisional process.

If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or

(b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.

The State's interest is not dependent on an estimate of the impact the parental-consent requirement may have on the total number of abortions that may take place. I assume that parents will sometimes prevent abortions which might better be performed; other parents may advise abortions that should not be performed. Similarly, even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages which a parent could evaluate in better perspective. In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible.

The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives. This assumption is, of course, correct and consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though

it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in particular cases. The Court seems to assume that the capacity to conceive a child and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision. I doubt the accuracy of the Court's empirical judgment. Even if it were correct, however, as a matter of constitutional law I think a State has power to conclude otherwise and to select a chronological age as its standard.

In short, the State's interest in the welfare of its young citizens is sufficient, in my judgment, to support the parental-consent requirement.

# SINGLETON, CHIEF, BUREAU OF MEDICAL SERVICES, DEPARTMENT OF HEALTH AND WELFARE OF MISSOURI *v.* WULFF ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74–1393. Argued March 23, 1976—Decided July 1, 1976

Respondents, two Missouri-licensed physicians, brought this action for injunctive relief and a declaration of the unconstitutionality of a Missouri statute that excludes abortions that are not "medically indicated" from the purposes for which Medicaid benefits are available to needy persons. In response to petitioner's pre-answer motion to dismiss, each respondent averred that he had provided, and anticipated providing, abortions to needy patients, and that petitioner, the responsible state official, acting in reliance on the challenged statute, had refused all Medicaid applications filed in connection with such abortions. A three-judge District Court dismissed the relevant count of the complaint for lack of standing, having concluded that no logical nexus existed between the status asserted by respondents and the claim that they sought to have adjudicated. The Court of Appeals reversed, finding that respondents had alleged sufficient "injury in fact" and also an interest "arguably within the zone of interests to be protected . . . by the . . . constitutional guarantees in question." That court then considered the case on the merits and found that the challenged statute clearly violated the Equal Protection Clause. *Held:* The judgment is reversed and the case is remanded. Pp. 112–121; 121–122; 122.

508 F. 2d 1211, reversed and remanded.

MR. JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts I, II–A, and III, finding that:

1. Respondents had standing to maintain this suit. Respondents alleged "injury in fact," *i. e.*, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to the District Court's Art. III jurisdiction. If respondent physicians prevail in their suit to remove the statutory limitation on reimbursable abortions, they will benefit by receiving

payment for the abortions and the State will be out of pocket by the amount of the payments. Pp. 112–113.

2. The Court of Appeals should not have proceeded to resolve the merits of this case, since petitioner, who has not filed an answer or other pleading addressed to the merits, has not had the opportunity to present evidence or legal arguments in defense of the statute. Pp. 119–121.

MR. JUSTICE BLACKMUN, joined by MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, concluded, in Part II–B, that as a prudential matter, respondents are proper proponents of the particular rights on which they base their suit. Though "[o]rdinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party," *Barrows* v. *Jackson*, 346 U. S. 249, 255, here the underlying justification for that rule is absent. A woman cannot safely secure an abortion without a physician's aid, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. Aside from the woman herself, the physician is uniquely qualified, by virtue of his confidential, professional relationship with her, to litigate the constitutionality of the State's interference with, or discrimination against, the abortion decision. Moreover, there are obstacles to the woman's assertion of her own rights, in that the desire to protect her privacy may deter her from herself bringing suit, and her claim will soon become at least technically moot if her indigency forces her to forgo the abortion. Pp. 113–118.

BLACKMUN, J., announced the judgment of the Court and delivered an opinion of the Court with respect to Parts I, II–A, and III, in which all Members joined, and in which, as to Part II–B, BRENNAN, WHITE, and MARSHALL, JJ., joined. STEVENS, J., filed an opinion concurring in part, *post*, p. 121. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 122.

*Michael L. Boicourt*, Assistant Attorney General of Missouri, argued the cause for petitioner. With him on the brief was *John C. Danforth*, Attorney General.

*Frank Susman* argued the cause and filed a brief for respondents.

MR. JUSTICE BLACKMUN delivered the opinion of the Court (Parts I, II–A, and III) together with an opinion (Part II–B), in which MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL joined.

Like its companions,[1] this case involves a claim of a State's unconstitutional interference with the decision to terminate pregnancy. The particular object of the challenge is a Missouri statute excluding abortions that are not "medically indicated" from the purposes for which Medicaid benefits are available to needy persons. In its present posture, however, the case presents two issues not going to the merits of this dispute. The first is whether the plaintiff-appellees, as physicians who perform nonmedically indicated abortions, have standing to maintain the suit, to which we answer that they do. The second is whether the Court of Appeals, exercising jurisdiction because the suit had been dismissed in the District Court for lack of standing, properly proceeded to a determination of the merits, to which we answer that it did not.

I

Missouri participates in the so-called Medicaid program, under which the Federal Government partially underwrites qualifying state plans for medical assistance to the needy. See 42 U. S. C. § 1396 *et seq.* (1970 ed. and Supp. IV). Missouri's plan, which is set out in Mo. Rev. Stat. §§ 208.151–208.158 (Supp. 1975), includes, in § 208.152, a list of 12 categories of medical services that are eligible for Medicaid funding. The last is:

> "(12) Family planning services as defined by federal rules and regulations; provided, however, that such family planning services shall not in-

[1] *Planned Parenthood of Missouri* v. *Danforth, ante,* p. 52, *Bellotti* v. *Baird, post,* p. 132.

clude abortions unless such abortions are medically indicated."

This provision is the subject of the litigation before us.[2]

The suit was filed in the United States District Court for the Eastern District of Missouri by two Missouri-licensed physicians. Each plaintiff avers, in an affidavit filed in opposition to a motion to dismiss, that he "has provided, and anticipates providing abortions to welfare patients who are eligible for Medicaid payments." App. 32, 36.[3] The plaintiffs further allege in their affidavits that all Medicaid applications filed in connection with abortions performed by them have been refused by the defendant, who is the responsible state official,[4] in reliance on the challenged § 208.152 (12). App. 32, 36. It is not entirely clear who has filed these applications. One affiant states that "he and [his] patients have been refused," *id.*, at 32; the other refers to "those who have submitted applications for such payments on his behalf" and states that such "payments have been refused." *Id.*, at 36. Indeed, it is not entirely clear to whom the payments would go if they were made. We assume, however, from the statute's several references to payments "on behalf of" eligible persons, see §§ 208.151 and 208.-152, that the provider of the services himself seeks

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[2] The complaint contained two additional counts directed against the Missouri State Board of Registration for the Healing Arts, and concerning other Missouri statutes relating to abortions upon minors. The District Court's dismissal of those counts has not been appealed and is not now before us.

[3] Plaintiffs sued on their own behalf and on behalf of the class of similarly situated physicians. App. 15. Apparently, however, the suit was dismissed by the District Court before any such class was certified.

[4] Defendant Singleton, petitioner herein, is Chief of the Bureau of Medical Services in the Division of Welfare of Missouri's Department of Public Health and Welfare. *Id.*, at 16.

reimbursement from the State. In any event, each plaintiff states that he anticipates further refusals by the defendant to fund nonmedically indicated abortions. Each avers that such refusals "deter [him] from the practice of medicine in the manner he considers to be most expertise [*sic*] and beneficial for said patients . . . and chill and thwart the ordinary and customary functioning of the doctor-patient relationship." App. 32, 36.

The complaint sought a declaration of the statute's invalidity and an injunction against its enforcement. A number of grounds were stated, among them that the statute, "on its face and as applied," is unconstitutionally vague, "[d]eprives plaintiffs of their right to practice medicine according to the highest standards of medical practice"; "[d]eprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children"; "[i]nfringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment"; and "[d]eprives plaintiffs and their patients, each in their own classification, of the equal protection of the laws." *Id.*, at 16, 12–13.

The defendant's sole pleading in District Court was a pre-answer motion to dismiss. Dismissal was sought upon several alternative grounds: that there was no case or controversy; that the plaintiffs lacked "standing to litigate the constitutional issues raised"; that injunctive relief "cannot be granted" because of absence of "irreparable harm" to the plaintiffs; that the plaintiffs "personally could suffer no harm"; and that in any case they "cannot litigate the alleged deprivation or infringement of the civil rights of their welfare patients." *Id.*, at 24–25.

The plaintiffs having responded to this motion with a memorandum and also with the affidavits described

above, the three-judge panel that had been convened to hear the case dismissed the count now before us "for lack of standing." The court saw no "logical nexus between the status asserted by the plaintiffs and the claim they seek to have adjudicated." *Wulff* v. *State Bd. of Registration for Healing Arts,* 380 F. Supp. 1137, 1144 (1974).

The United States Court of Appeals for the Eighth Circuit reversed. 508 F. 2d 1211 (1974). It reasoned that *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), as interpreted in several of its own earlier decisions, had " 'paved the way for physicians to assert their constitutional rights to practice medicine,' " citing *Nyberg* v. *City of Virginia,* 495 F. 2d 1342, 1344 (CA8), appeal dismissed and cert. denied, 419 U. S. 891 (1974). Those rights were said to include " 'the right to advise and perform abortions,' " and furthermore to be " 'inextricably bound up with the privacy rights of women who seek abortions.' " 508 F. 2d, at 1213. Clearly, the restriction of Medicaid benefits affected the plaintiff physicians "both professionally and monetarily." *Id.,* at 1214. The result, in the Court of Appeals' view, was that they had alleged sufficient " 'injury in fact,' " and also an interest " 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question,' " *ibid.,* quoting *Data Processing Service* v. *Camp,* 397 U. S. 150, 153 (1970).

Although it found the matter "not without its difficulty," 508 F. 2d, at 1214, the Court of Appeals next concluded that, being "urged by appellants" (respondents here), it should proceed from the standing question to the merits of the case. This, rather than a remand, it considered proper because the question of the statute's validity could not profit from further refinement, and indeed was one whose answer was in no doubt. The

statute was "obviously unconstitutional," and it therefore appeared "that the case might well have been decided by one federal judge." *Id.*, at 1215. The court, accordingly, chose "to make final determination of this case." *Ibid.* Proceeding to the merits, the court found a "clear violation of the Equal Protection Clause." *Ibid.* The statute constituted a "special regulation on abortion," and discriminated against both the patient and the physician "by reason of the patient's poverty." *Id.*, at 1215–1216. Section 208.152 (12) was therefore declared unconstitutional by the Court of Appeals. Injunctive relief was felt to be unnecessary, it being assumed that the State would comply with the declaration and cease any discrimination between needy patients seeking therapeutic and nontherapeutic abortions. 508 F. 2d, at 1213–1216. We granted certiorari, limited to the two questions identified in the opening paragraph of this opinion. 422 U. S. 1041 (1975).

II

Although we are not certain that they have been clearly separated in the District Court's and Court of Appeals' opinions, two distinct standing questions are presented. We have distinguished them in prior cases, *e. g.*, *Data Processing Service* v. *Camp*, 397 U. S., at 152–153; *Flast* v. *Cohen*, 392 U. S. 83, 99 n. 20 (1968); *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953), and they are these: First, whether the plaintiff-respondents allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction, and, second, whether, as a prudential matter, the plaintiff-respondents are proper proponents of the particular legal rights on which they base their suit.

A. The first of these questions needs little comment, for there is no doubt now that the respondent-physicians

suffer concrete injury from the operation of the challenged statute. Their complaint and affidavits, described above, allege that they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the limitation of reimbursable abortions to those that are "medically indicated." If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions. The State (and Federal Government) will be out of pocket by the amount of the payments. The relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 37–39 (1976); *Investment Co. Institute* v. *Camp*, 401 U. S. 617, 620–621 (1971); *Data Processing Service* v. *Camp*, 397 U. S., at 151–156.

B. The question of what rights the doctors may assert in seeking to resolve that controversy is more difficult. The Court of Appeals adverted to what it perceived to be the doctor's own "constitutional rights to practice medicine." 508 F. 2d, at 1213. We have no occasion to decide whether such rights exist. Assuming that they do, the doctors, of course, can assert them. It appears, however, that the Court of Appeals also accorded the doctors standing to assert, and indeed granted them relief based partly upon, the rights of their patients. We must decide whether this assertion of *jus tertii* was a proper one.

Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those

rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. See *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring) (offering the standing requirement as one means by which courts avoid unnecessary constitutional adjudications). Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*. See, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186, 204 (1962) (standing requirement aimed at "assur[ing] that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends"); *Holden* v. *Hardy*, 169 U. S. 366, 397 (1898) (assertion of third parties' rights would come with "greater cogency" from the third parties themselves). These two considerations underlie the Court's general rule: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows* v. *Jackson*, 346 U. S., at 255. See also *Flast* v. *Cohen*, 392 U. S., at 99 n. 20; *McGowan* v. *Maryland*, 366 U. S. 420, 429 (1961).

Like any general rule, however, this one should not be applied where its underlying justifications are absent. With this in mind, the Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of

the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. Thus in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), where two persons had been convicted of giving advice on contraception, the Court permitted the defendants, one of whom was a licensed physician, to assert the privacy rights of the married persons whom they advised. The Court pointed to the "confidential" nature of the relationship between the defendants and the married persons, and reasoned that the rights of the latter were "likely to be diluted or adversely affected" if they could not be asserted in such a case. *Id.,* at 481. See also *Eisenstadt* v. *Baird,* 405 U. S. 438, 445–446 (1972) (stressing "advocate" relationship and "impact of the litigation on the third-party interests"); *Barrows* v. *Jackson,* 346 U. S., at 259 (owner of real estate subject to racial covenant granted standing to challenge such covenant in part because she was "the one in whose charge and keeping repose[d] the power to continue to use her property to discriminate or to discontinue such use"). A doctor-patient relationship similar to that in *Griswold* existed in *Doe* v. *Bolton,* where the Court also permitted physicians to assert the rights of their patients.[5] 410 U. S., at 188–189. Indeed, since that right was the right to an abortion, *Doe* would flatly control the instant case were it not for the fact that there the physicians were seeking protection from possible criminal prosecution.

The other factual element to which the Court has looked is the ability of the third party to assert his own

[5] We have reiterated that holding today in *Planned Parenthood of Missouri* v. *Danforth, ante,* at 62.

right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent. Thus, in *NAACP* v. *Alabama*, 357 U. S. 449 (1958), the Court held that the National Association for the Advancement of Colored People, in resisting a court order that it divulge the names of its members, could assert the First and Fourteenth Amendments rights of those members to remain anonymous. The Court reasoned that "[t]o require that [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *Id.*, at 459. See also *Eisenstadt* v. *Baird*, 405 U. S., at 446; *Barrows* v. *Jackson*, 346 U. S., at 259.[6]

[6] MR. JUSTICE POWELL objects that such an obstacle is not enough, that our prior cases allow assertion of third-party rights only when such assertion by the third parties themselves would be "in all practicable terms impossible." *Post*, at 126. Carefully analyzed, our cases do not go that far. The Negro real-estate purchaser in *Barrows*, if he could prove that the racial covenant alone stood in the way of his purchase (as presumably he could easily have done, given the amicable posture of the seller in that case), could surely have sought a declaration of its invalidity or an injunction against its enforcement. The Association members in *NAACP* v. *Alabama* could have obtained a similar declaration or injunction, suing anonymously by the use of pseudonyms. The recipients of contraceptives in *Eisenstadt* (or their counterparts in *Griswold* and *Doe*, for that matter) could have sought similar relief as necessary to the enjoyment of their constitutional rights. The point is not that these were easy alternatives, but that they differed only in the degree of difficulty, if they differed at all, from the alternative in this case of the women themselves seeking a declaration or injunction that would force the State to pay the doctors for their abortions.

Application of these principles to the present case quickly yields its proper result. The closeness of the relationship is patent, as it was in *Griswold* and in *Doe*. A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. See *Roe* v. *Wade*, 410 U. S., at 153–156. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision.

As to the woman's assertion of her own rights, there are several obstacles. For one thing, she may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim. Only a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost, assuming, as it seems fair to assume, that unless the impecunious woman can establish Medicaid eligibility she must forgo abortion. It is true that these obstacles are not insurmountable. Suit may be brought under a pseudonym, as so frequently has been done. A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is " 'capable of repetition yet evading review.' " *Roe* v. *Wade*, 410 U. S., at 124–125. And it may be that a class could be assembled, whose fluid membership always included some women with live claims. But if the assertion of the right is to be "representative" to such

an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician.

For these reasons, we conclude that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision, and we decline to restrict our holding to that effect in *Doe* to its purely criminal context.[7] In this respect, the judgment of the Court of Appeals is affirmed.

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[7] MR. JUSTICE POWELL would so limit *Doe*, and the other cases cited, explaining them as cases in which the State "directly interfered with the abortion decision" and "directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures." *Post*, at 128. There is no support in the language of the cited cases for this distinction, and we are given no logical reason why "direct" interference with a litigant's conduct should provide a special reason for allowing him to assert third-party rights. Moreover, a "direct interference" or "interdiction" test does not appear to be supported by precedent. We have allowed *jus tertii* assertion where the interference was no more direct than it is here. In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), for example, private schools were permitted to assert the rights of parents as against a state requirement that their children receive a public education, even though the private schools were not thereby "interdicted" at all, but only reduced to the role of supplementing the public school education. Conversely, we regularly *dis*allow *jus tertii* assertion even though the State has "interdicted" the litigant's conduct to the point of "criminalizing" it. See *Brown* v. *United States*, 411 U. S. 223, 230 (1973) (Fourth Amendment rights of others); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (1973) (rights of others to be free from application of same statute); *McGowan* v. *Maryland*, 366 U. S. 420, 429–430 (1961) (store owners convicted of violating Sunday closing laws could not assert religious liberty rights of customers). Finally, it is not clear why a "direct interference" or "interdiction" test would not allow the *jus tertii* assertion in this case. For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective

## III

On this record, we do not agree, however, with the action of the Court of Appeals in proceeding beyond the issue of standing to a resolution of the merits of the case. Petitioner urges that this action was particularly inappropriate because the case is one in which the requested injunctive relief could be granted or denied on the merits only by a three-judge district court, with direct appeal here. We find it unnecessary to reach this contention, or the respondents' arguments that a three-judge court was not required because the statute is so patently unconstitutional and because in any event only declaratory relief is warranted. Quite apart from these considerations, the Court of Appeals' resolution of the merits

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an "interdiction" of it as would ever be necessary. Furthermore, since the right asserted in this case is not simply the right to have an abortion, but the right to have abortions nondiscriminatorily funded, the denial of such funding is as complete an "interdiction" of the exercise of the right as could ever exist.

MR. JUSTICE POWELL also voices the concern that our decision today will be "difficult to cabin," and threatens to allow "any provider of services . . . to assert his client's or customer's constitutional rights, if any, in an attack on a welfare statute that excludes from coverage his particular transaction." *Post*, at 129, 129–130. It is true that it is more difficult to predict the pattern of results in future cases when the Court elects to proceed, as it does today, by assessing relevant factors in individual cases (and we give no decisive or pre-eminent importance to any one of these factors), rather than by adopting a set of *per se* rules, such as those MR. JUSTICE POWELL would apparently prefer based on the "direct interdiction" of the litigant's conduct and the impossibility of third-party assertion. Still, we cannot share the Justice's alarm. Unless the "provider of services" that he has in mind enjoys with his "client" a confidential relationship such as that of the doctor and patient, unless the "client's" claim is imminently moot, as the pregnant woman's technically is, the standing issue in such a future case will not be definitively controlled by this one. Beyond that, we simply decline to speculate on cases not before us.

seems to us to be an unacceptable exercise of its appellate jurisdiction.

As noted, with respect to the complaint's count that is before us, petitioner filed in the District Court only a pre-answer motion to dismiss for lack of standing. He filed no answer, and no other pleading addressed to the merits. He did answer some interrogatories, App. 26, but stipulated to no facts, and gave no intimation of what defenses, if any, he might have other than the plaintiffs' alleged lack of standing. The District Court granted his motion to dismiss and no more. That dismissal was the "final decision" appealed from, see 28 U. S. C. § 1291, and on appeal petitioner limited himself entirely to the standing determination that underlay it. In short, petitioner has never been heard in any way on the merits of the case.

It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel* v. *Helvering*, 312 U. S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he was justified in not presenting those arguments to the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it.

The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, see *Turner* v. *City of Memphis,* 369 U. S. 350 (1962), or where "injustice might otherwise result." *Hormel* v. *Helvering,* 312 U. S., at 557.[8] Suffice it to say that this is not such a case. The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard.

Assuming, therefore, that the Court of Appeals had jurisdiction to proceed to the merits in this case, we hold that it should not have done so. To that extent, its judgment is reversed, and the case is remanded with directions that it be returned to the District Court so that petitioner may file an answer to the complaint and the litigation proceed accordingly.

*It is so ordered.*

MR. JUSTICE STEVENS, concurring in part.

In this case (1) the plaintiff-physicians have a financial stake in the outcome of the litigation, and (2) they claim that the statute impairs their own constitutional rights. They therefore clearly have standing to bring this action.

Because these two facts are present, I agree that the analysis in Part II–B of MR. JUSTICE BLACKMUN'S opinion provides an adequate basis for considering the arguments

[8] These examples are not intended to be exclusive.

based on the effect of the statute on the constitutional rights of their patients. Because I am not sure whether the analysis in Part II–B would, or should, sustain the doctors' standing, apart from those two facts, I join only Parts I, II–A, and III of the Court's opinion.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

The Court holds that the respondents have standing to bring this suit and to assert their own constitutional rights, if any, in an attack on Mo. Rev. Stat. § 208.152 (12) (Supp. 1975). The Court also holds that the Court of Appeals erred in proceeding to the merits of respondents' challenge. I agree with both of these holdings and therefore concur in Parts I, II–A, and III of JUSTICE BLACKMUN's opinion, as well as in the first four sentences of Part II–B.

The Court further holds that after remand to the District Court the respondents may assert, in addition to their own rights, the constitutional rights of their patients who would be eligible for Medicaid assistance in obtaining elective abortions but for the exclusion of such abortions in § 208.152 (12). I dissent from this holding.

## I

As the Court notes, *ante,* at 109–110, respondents by complaint and affidavit established their Art. III standing to invoke the judicial power of the District Court. They have performed abortions for which Missouri's Medicaid system would compensate them directly [1] if the challenged statutory section did not preclude it. Re-

[1] As the Court notes, *ante,* at 109–110, Missouri has structured its Medicaid system so that payments for medical services are made directly to the physician rather than to the patient.

spondents allege an intention to continue to perform such abortions, and that the statute deprives them of compensation. These arguments, if proved, would give respondents a personal stake in the controversy over the statute's constitutionality. See *Warth* v. *Seldin*, 422 U. S. 490, 498–499 (1975); cf. *id.*, at 502–508; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 40–46 (1976).

II

We noted in *Warth*, and the Court is careful to reiterate today, *ante*, at 112, that the Art. III standing inquiry often is only the first of two inquiries necessary to determine whether a federal court should entertain a claim at the instance of a particular party. The Art. III question is one of power within our constitutional system, as courts may decide only actual cases and controversies between the parties who stand before the court. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, at 41–42. Beyond this question, however, lies the further and less easily defined inquiry of whether it is prudent to proceed to decision on particular issues even at the instance of a party whose Art. III standing is clear. This inquiry has taken various forms, including the one presented by this case: whether, in defending against or anticipatorily attacking state action, a party may argue that it contravenes someone else's constitutional rights.[2]

[2] The inquiry also has been framed, in appropriate cases, as whether a person with Art. III standing is asserting an interest arguably within the zone of interests intended to be protected by the constitutional or statutory provision on which he relies, see, *e. g.*, *Data Processing Service* v. *Camp*, 397 U. S. 150, 153–156 (1970), or whether a person should be allowed to attack a statute, not on the ground that it is unconstitutional as applied to him, but that it would be unconstitutional as applied to third parties, see, *e. g.*, *United States* v. *Raines*, 362 U. S. 17 (1960); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–488 (1965); *Broadrick* v. *Oklahoma*,

This second inquiry is a matter of "judicial self-governance." *Warth* v. *Seldin, supra,* at 509. The usual—and wise—stance of the federal courts when policing their own exercise of power in this manner is one of cautious reserve. See generally *Ashwander* v. *TVA,* 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). This caution has given rise to the general rule that a party may not defend against or attack governmental action on the ground that it infringes the rights of some third party, *ante,* at 114, and to the corollary that any exception must rest on specific factors outweighing the policies behind the rule itself.[3] See *Barrows* v. *Jack-*

413 U. S. 601, 611–618 (1973). Cf. generally *United States* v. *Richardson,* 418 U. S. 166, 196 n. 18 (1974) (POWELL, J., concurring).

[3] I agree with the plurality, *ante,* at 113–114, that a fundamental policy behind the general rule is a salutary desire to avoid unnecessary constitutional adjudication. See *Ashwander* v. *TVA,* 297 U. S., at 346–348 (Brandeis, J., concurring). The plurality perceives a second basis for the rule in the courts' need for effective advocacy. While this concern is relevant, it should receive no more emphasis in this context than in the context of Art. III standing requirements. There the need for effective advocacy or a factual sharpening of issues long was the touchstone of discussion. See *Baker* v. *Carr,* 369 U. S. 186, 204 (1962); *Flast* v. *Cohen,* 392 U. S. 83, 99 (1968). Perhaps a more accurate formulation of the Art. III limitation—one consistent with the concerns underlying the constitutional provision—is that the plaintiff's stake in a controversy must insure that exercise of the court's remedial powers is both necessary and sufficient to give him relief. See *Warth* v. *Seldin,* 422 U. S. 490, 498–499, 508 (1975); *Simon* v. *Eastern Ky. Welfare Rights Org.,* 426 U. S. 26, 38, and n. 16 (1976). The Court today uses this formulation. *Ante,* at 112–113. A similar focus upon the proper judicial role, rather than quality of advocacy, is preferable in the area of prudential limitations upon judicial power. See *Warth* v. *Seldin, supra,* at 498; cf. *Schlesinger* v. *Reservists to Stop the War,* 418 U. S. 208, 225–226 (1974).

Congress by statute may foreclose any inquiry into competing policy considerations and give a party with Art. III standing the

*son,* 346 U. S. 249, 257 (1953); cf. generally *United States* v. *Richardson,* 418 U. S. 166, 188–197 (1974) (POWELL, J., concurring).

The plurality acknowledges this general rule, but identifies "two factual elements"—thought to be derived from prior cases—that justify the adjudication of the asserted third-party rights: (i) obstacles to the assertion by the third party of her own rights, and (ii) the existence of some "relationship" such as the one between physician and patient. In my view these factors do not justify allowing these physicians to assert their patients' rights.

A

Our prior decisions are enlightening. In *Barrows* v. *Jackson, supra,* a covenantor who breached a racially restrictive covenant by selling to Negroes was permitted to set up the buyers' rights to equal protection in defense against a damages action by the covenantees. See *Shelley* v. *Kraemer,* 334 U. S. 1 (1948). The Court considered the general rule outweighed by "the need to protect [these] fundamental rights" in a situation "in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." 346 U. S., at 257. It would indeed have been difficult if not impossible for the rightholders to assert their own rights: the operation of the restrictive covenant and the threat of damages actions for its breach tended to insure they would not come into possession of the land, and there was at the time little chance of a successful suit based on a covenantor's failure to sell to them. In a second case, *NAACP* v. *Alabama,* 357 U. S. 449 (1958), an organization was allowed to resist an order to produce its membership list by asserting the associational rights

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right to assert the interests of third parties or even the public interest. See *Warth* v. *Seldin, supra,* at 500–501.

of its members to anonymity because, as the plurality notes, *ante,* at 116, the members themselves would have had to forgo the rights in order to assert them. And in *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972), the Court considered it necessary to relax the rule and permit a distributor of contraceptives to assert the constitutional rights of the recipients because the statutory scheme operating to deny the contraceptives to the recipients appeared to offer them no means of challenge. *Id.,* at 446.

The plurality purports to derive from these cases the principle that a party may assert another's rights if there is "some genuine obstacle" to the third party's own litigation. *Ante,* at 116. But this understates the teaching of those cases: On their facts they indicate that such an assertion is proper, not when there is merely some "obstacle" to the rightholder's own litigation, but when such litigation is in all practicable terms impossible. Thus, in its framing of this principle, the plurality has gone far beyond our major precedents.

Moreover, on the plurality's own statement of this principle and on its own discussion of the facts, the litigation of third-party rights cannot be justified in this case. The plurality virtually concedes, as it must, that the two alleged "obstacles" to the women's assertion of their rights are chimerical. Our docket regularly contains cases in which women, using pseudonyms, challenge statutes that allegedly infringe their right to exercise the abortion decision. Nor is there basis for the "obstacle" of incipient mootness when the plurality itself quotes from the portion of *Roe* v. *Wade,* 410 U. S. 113, 124–125 (1973), that shows no such obstacle exists. In short, in light of experience which we share regularly in reviewing appeals and petitions for certiorari, the "obstacles" identified by the plurality as justifying departure from the general rule

simply are not significant. Rather than being a logical descendant of *Barrows*, *NAACP*, and *Eisenstadt*, this case is much closer to *Warth* v. *Seldin*, *supra*, in which taxpayers were refused leave to assert the constitutional rights of low-income persons in part because there was no obstacle to those low-income persons' asserting their own rights in a proper case.[4] See 422 U. S., at 509–510; cf. *McGowan* v. *Maryland*, 366 U. S. 420, 430 (1961).

## B

The plurality places primary reliance on a second element, the existence of a "confidential relationship" between the rightholder and the party seeking to assert her rights.[5] Focusing on the professional relationships

[4] The plurality retrospectively analyzes the facts in *Barrows*, *NAACP*, and *Eisenstadt* in an effort to show that litigation by the rightholders was possible in each case. *Ante*, at 116 n. 6. While this technically may be true, it also is true that the Court in *Barrows* and *NAACP* expressly emphasized the extreme difficulty of such litigation. Moreover, the plurality underestimates the difficulty confronting a would-be Negro vendee in *Barrows* who attempted to prove that race alone blocked his deal with a covenantor. And the plurality denigrates the difficulty of the NAACP members' assertion of their own right to anonymity when in the text on the same page it quotes, approvingly, the very language in the *NAACP* case expressing the difficulty of such litigation. As for *Eisenstadt*, allowing the assertion of third-party rights there was justified not only because of the difficulty of rightholders' litigation, but also because the State directly interdicted a course of conduct that allegedly enjoyed constitutional protection. As explained *infra*, Part II–B, the Court rightly shows special solicitude in that situation.

In any event, as argued above in the text, my basic disagreement with the plurality rests on the facts of *this case*, and the application of the plurality's *own* test—"some genuine obstacle" to the rightholder's assertion of her own rights. There simply is *no* such obstacle here.

[5] The plurality's primary emphasis upon this relationship is in

present in *Griswold, Doe* and *Planned Parenthood of Missouri* v. *Danforth, ante,* p. 52, the plurality suggests that allowing the physicians in this case to assert their patients' rights flows naturally from those three. Indeed, its conclusion is couched in terms of the general appropriateness of allowing physicians to assert the privacy interests of their patients in attacks on "governmental interference with the abortion decision." *Ante,* at 115, 118.

With all respect, I do not read these cases as merging the physician and his patient for constitutional purposes. The principle they support turns not upon the confidential nature of a physician-patient relationship but upon the nature of the State's impact upon that relationship. In each instance the State directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures. In the circumstances of direct interference, I agree that one party to the relationship should be permitted to assert the constitutional rights of the other, for a judicial rule of self-restraint should not preclude an attack on a State's proscription of constitutionally protected activity. See also *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). But Missouri has not directly interfered with the abortion decision—neither the physicians nor their patients are forbidden to engage

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marked contrast to the Court's previous position that the relationship between litigant and rightholder was subordinate in importance to "the impact of the litigation on the third-party interests." *Eisenstadt* v. *Baird,* 405 U. S. 438, 445 (1972). I suspect the plurality's inversion of the previous order results from the weakness of the argument that this litigation is necessary to protect third-party interests. I would keep the emphasis where it has been before, and would consider the closeness of any "relationship" only as a factor imparting confidence that third-party interests will be represented adequately in a case in which allowing their assertion is justified on other grounds. Cf. n. 2, *supra.*

in the procedure.[6] The only impact of § 208.152 (12) is that, because of the way Missouri chose to structure its Medicaid payments, it causes these doctors financial detriment. This affords them Art. III standing because they aver injury in fact, but it does not justify abandonment of the salutary rule against assertion of third-party rights.

C

The physicians have offered no special reason for allowing them to assert their patients' rights in an attack on this welfare statute, and I can think of none. Moreover, there are persuasive reasons not to permit them to do so. It seems wholly inappropriate, as a matter of judicial self-governance, for a court to reach unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services. And second, this case may well set a precedent that will prove difficult to cabin. No reason immediately comes to mind, after today's holding, why any provider of services should be denied standing to assert his client's or customer's constitutional rights,

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[6] The plurality contends that assertion of third-party rights has been allowed where "the interference was no more direct than it is here," *ante*, at 118 n. 7, and cites *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). *Pierce* is of little or no precedential value since the Court did not address—or even mention—the issue of third-party rights in that case. More importantly, however, the interference with the normal functioning of the private school-parent relationship was as complete as if it had been proscribed: as the statute required that children be sent "'to a public school for the period of time a public school shall be held during the current year,'" *id.*, at 530, there was no practical way for parents to send their children to private schools. As the Court noted, "[t]he inevitable practical result of enforcing the Act . . . would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon." *Id.*, at 534.

if any, in an attack on a welfare statute that excludes from coverage his particular transaction.[7]

Putting it differently, the Court's holding invites litigation by those who perhaps have the least legitimate ground for seeking to assert the rights of third parties.

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[7] The plurality says it is proceeding "by assessing relevant factors in individual cases . . . , rather than by adopting a set of *per se* rules," and implies that I am advocating the latter course. *Ante*, at 119 n. 7. The fact is that I have not proposed any such set of rules. Rather, my dissent is grounded in the decisions of the Court from which I believe today's holding departs.

By divining from previous cases two factors, and two factors alone, whose application to the facts of this case "quickly yields its proper result," *ante*, at 117, the plurality appears to have articulated a new rule of third-party standing that leaves little room for flexibility. The ease with which the plurality would allow assertion of such standing in this case—based on nothing more substantial than a professional (or perhaps only an abortion-clinic) relationship and dimly perceived "obstacles" to the rightholder's own litigation—suggests that "the proper result" usually will be third-party standing.

The plurality's attempt to distinguish this case from the next one involving another provider of services is not reassuring. Three distinguishing factors are suggested. The first one, a "confidential" relationship, is analytically empty (especially when one recognizes that, realistically, the "confidential" relationship in a case of this kind often is set in an assembly-line type abortion clinic). Moreover, it is unsupported by nearly half of the cases the plurality relies upon in finding "relationship" one of the two elements yielding third-party standing: there was no "confidential" relationship in *Barrows* or *Eisenstadt*—or, so far as the opinion shows, with respect to one of the defendants in *Griswold*. The second suggested distinction is that the woman's right in this case "is one that may be impaired by its assertion." I do not understand how a woman's litigation over her right to make an abortion decision impairs her ability to make that decision. Finally, the plurality falls back on the contention that the woman's claim here is "imminently moot," a point which the plurality's own citation to *Roe* proves to be irrelevant. As these three "distinctions" seem insubstantial, I repeat: Today's holding will be difficult to cabin.

Before today I certainly would not have thought that an interest in being compensated for professional services, without more, would be deemed a sufficiently compelling reason to justify departing from a rule of restraint that well serves society and our judicial system. The Court quite recently stated, with respect to the rule against assertion of third-party rights as well as certain other doctrines of judicial self-restraint, that "[t]hese principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. . . . Constitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *Broadrick* v. *Oklahoma*, 413 U. S., at 610–611 (citation omitted). Today's holding threatens to make just such "roving commissions" of the federal courts.

# BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 75–73. Argued March 23, 1976—Decided July 1, 1976*

A 1974 Massachusetts statute governs the type of consent, including parental consent, required before an abortion may be performed on an unmarried woman under the age of 18. Appellees, an abortion counseling organization, its president and its medical director, and several unmarried women who were pregnant at the time, brought a class action against appellant Attorney General and District Attorneys, claiming that the statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. A temporary restraining order was entered prior to the effective date of the statute. Thereafter, a three-judge District Court held the statute unconstitutional as creating a "parental veto" over the performance of abortions on minor children in that it applied even to those minors capable of giving informed consent, and permanently enjoined its operation, denying by implication appellants' motion that the court abstain from deciding the issue pending authoritative construction of the statute by the Massachusetts Supreme Judicial Court. In 1975, after the District Court's decision Massachusetts enacted a statute dealing with consent by minors to medical procedures other than abortion and sterilization, and in this Court appellees raised an additional claim of impermissible distinction between the consent procedures applicable to minors in the area of abortion under the 1974 statute and the consent required by the 1975 statute in regard to other medical procedures. *Held:* The District Court should have abstained from deciding the constitutional issue and should have certified to the Massachussets Supreme Judicial Court appropriate questions concerning the meaning of the 1974 statute and the procedure it imposes. Pp. 143–152.

(a) Abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary that

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*Together with No. 75–109, *Hunerwadel* v. *Baird et al.*, also on appeal from the same court.

"might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison* v. *NAACP*, 360 U. S. 167, 177. Pp. 146–147.

(b) Here the 1974 statute is susceptible of appellants' interpretation that while it prefers parental consultation and consent it permits a minor capable of giving informed consent to obtain a court order allowing abortion without parental consultation and further permits even a minor incapable of giving informed consent to obtain an abortion order without parental consultation where it is shown that abortion would be in her best interests, and such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute. Pp. 147–148.

(c) In regard to the claim of impermissible discrimination due to the 1975 statute, it would be appropriate for the District Court also to certify a question concerning this statute, and the extent to which its procedures differ from the procedures required under the 1974 statute. Pp. 151–152.

393 F. Supp. 847, vacated and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

*S. Stephen Rosenfeld,* Assistant Attorney General of Massachusetts, argued the cause for appellants in No. 75–73. With him on the brief were *Francis X. Bellotti,* Attorney General, *pro se,* and *Michael Eby* and *Garrick F. Cole,* Assistant Attorneys General. *Brian A. Riley* argued the cause *pro hac vice* for appellant in No. 75–109. With him on the brief were *Thomas P. McMahon* and *Thomas P. Russell.*

*Roy Lucas* argued the cause and filed a brief for appellees in both cases.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this litigation, a three-judge District Court for the District of Massachusetts enjoined the operation of certain provisions of a 1974 Massachusetts statute that govern the type of consent required before an abortion may

be performed on an unmarried woman under the age of 18. In so acting, the court denied by implication a motion by appellants that the court abstain from deciding the issue pending authoritative construction of the statute by the Supreme Judicial Court of Massachusetts. We hold that the court should have abstained, and we vacate the judgment and remand the cases for certification of relevant issues of state law to the Supreme Judicial Court, and for abstention pending the decision of that tribunal.

## I

On August 2, 1974, the General Court of Massachusetts (Legislature), over the Governor's veto, enacted legislation entitled "An Act to protect unborn children and maternal health within present constitutional limits." The Act, Mass. Acts and Resolves 1974, c. 706, § 1, amended Mass. Gen. Laws Ann., c. 112 (Registration of Certain Professions and Occupations), by adding §§ 12H through 12R.[1] Section 12P provides:

> "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior

[1] Prior to the passage of the 1974 Act there were already in existence a § 12H and a § 12*I* of c. 112. These were added by Mass. Acts and Resolves 1973, c. 173, § 1, and c. 521, § 1, respectively. The former called for the printing of the physician's name on a prescription blank, and the latter concerned one's right not to participate in an abortion or sterilization procedure, and to be free from damages claims or discipline for exercising that right.

These pre-existing §§ 12H and 12*I* have not been repealed. Consequently, due to this legislative oversight, Massachusetts has two statutes denominated § 12H of c. 112, and two denominated § 12*I* of that chapter. This opinion, however, concerns only the 1974 legislation.

court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

All nonemergency abortions are made subject to the provisions of § 12P by § 12N.[2] Violations of § 12N are

[2] "*Section 12N.* Except in an emergency requiring immediate action, no abortion may be performed under sections twelve *I* [before 24 weeks] or twelve J [24 weeks or more] unless

"(1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and

"(2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery.

"Except in an emergency requiring immediate action no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services."

punishable under § 12Q by a fine of not less than $100 nor more than $2,000.[3] Section 12R provides that the Attorney General or any person whose consent is required may petition the superior court for an order enjoining the performance of any abortion.[4]

## II

On October 30, 1974, one day prior to the effective date of the Act,[5] plaintiffs, who are appellees here, filed this action in the United States District Court for the District of Massachusetts, asserting jurisdiction under 28 U. S. C. §§ 1343 (3), 1331, and 2201, and 42 U. S. C. § 1983, and claiming that § 12P violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They sought injunctive and declaratory relief, and requested the empaneling of a three-judge court pursuant to 28 U. S. C. §§ 2281 and 2284.

On October 31, the single District Judge issued an order temporarily restraining the enforcement of the parental-consent requirement of § 12P, and accepting the request for a three-judge court.[6] Record Doc. 2.

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[3] Section 12Q provides in pertinent part:

"Any person who willfully violates the provisions of sections twelve N or twelve O shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars."

[4] "*Section 12R.* The attorney general or any person whose consent is required either pursuant to section twelve P or under common law, may petition the superior court for an order enjoining the performance of any abortion that may be performed contrary to the provisions of sections twelve *I* through twelve Q."

[5] Unless a statute is declared an emergency or may not be made the subject of a referendum petition, a law passed by the General Court does not take effect "earlier than ninety days after it has become a law." Mass. Const. Amend., Art. 48, Referendum, pt. I (1963).

[6] Because of the temporary restraining order and the injunction subsequently issued by the three-judge court, Jurisdictional State-

The plaintiffs, and the classes they purported to represent, are:

1. William Baird, a citizen of New York.

2. Parents Aid Society, Inc., a Massachusetts not-for-profit corporation. Baird is president of the corporation and is director and chief counselor of the center it operates in Boston for the purpose of providing, *inter alia*, abortion and counseling services. Baird and Parents Aid claim to represent all abortion centers and their administrators in Massachusetts who, on a regular and recurring basis, deal with pregnant minors. App. 13, 43.

3. Mary Moes I, II, III, and IV, four minors under the age of 18, pregnant at the time of the filing of the suit, and residing in Massachusetts. Each alleged that she wished to terminate her pregnancy and did not wish to inform either of her parents.[7] *Id.*, at 16–18, 19–22. The Moes claimed to represent all pregnant minors capa-

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ment in No. 75–73, pp. A–33, A–34; App. 45–46, the parental-consent provisions of § 12P have not yet been effective.

[7] The complaint as originally filed, named only Mary Moe I and Mary Moe II as the pregnant minor plaintiffs, with affidavits concerning their status attached. App. 16–18. Thereafter, in November 1974, affidavits were executed by Mary Moe III and Mary Moe IV. *Id.*, at 19–22. The motion to certify the plaintiffs' classes, filed December 9, 1974, refers to the four Mary Moes. Similarly, the District Court referred to the fact that four Mary Moes were named in the action. 393 F. Supp. 847, 849, and n. 1 (1975). The record does not disclose how or when Mary Moes III and IV were added as parties plaintiff. In any event, Mary Moes II, III, and IV were dismissed from the suit for failure to adduce evidence supporting their standing, *id.*, at 849 n. 1, and they have not appealed that ruling. The way in which Mary Moes III and IV entered the case, therefore, is of no concern to us here.

We note that the fact the pregnancy of Mary Moe I has been terminated (through an abortion performed under the protection of the temporary restraining order entered by the District Court, *id.*, at 850 n. 4) in no way moots the case. *Roe* v. *Wade*, 410 U. S. 113, 124–125 (1973).

ble of, and willing to give, informed consent to an abortion, but who decline to seek the consent of both parents, as required by § 12P. App. 13, 43.

4. Gerald Zupnick, M. D., a physician licensed to practice in Massachusetts. He is the medical director of the center operated by Parents Aid. He claims to represent all physicians in Massachusetts who, without parental consent, see minor patients seeking abortions. *Ibid.*

The defendants in the action, who are the appellants in No. 75–73 (and who are hereinafter referred to as the appellants), are the Attorney General of Massachusetts, and the District Attorneys of all the counties in the Commonwealth.

Appellant in No. 75–109 (hereinafter referred to as the intervenor-appellant) is Jane Hunerwadel, a resident and citizen of Massachusetts, and parent of an unmarried minor female of childbearing age. Hunerwadel was permitted by the District Court to intervene as a defendant on behalf of herself and all others similarly situated.[8] App. 24.

On November 13, appellants filed a "Motion to dismiss and/or for summary judgment," arguing, *inter alia*, that the District Court "should abstain from deciding any issue in this case." *Id.*, at 23. In their memorandum to the court in support of that motion, appellants, in addition to other arguments, urged that § 12P, particularly in view of its judicial-review provision, "was

[8] Also permitted to intervene as defendants were Kathleen Roth and others, parents situated similarly to Hunerwadel, and Jane Doe, an anonymous parent of a pregnant unmarried minor. The District Court dismissed all the intervenors except Hunerwadel for failure to adduce facts necessary to show standing. 393 F. Supp., at 850. Technically, these dismissed intervenors, who have not appealed, might well be classified as appellees under our Rule 10 (4). Their status, however, does not affect the disposition of these cases.

susceptible of a construction by state courts that would avoid or modify any alleged federal constitutional question." Record Doc. 5, p. 12. They cited *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), and *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 510–511 (1972), for the proposition that where an unconstrued state statute is susceptible of a constitutional construction, a federal court should abstain from deciding a constitutional challenge to the statute until a definitive state construction has been obtained.

The District Court held hearings on the motion for a preliminary injunction; these were later merged into the trial on the merits. It received testimony from various experts and from parties to the case, including Mary Moe I. On April 28, 1975, the three-judge District Court, by a divided vote, handed down a decision holding § 12P unconstitutional and void. 393 F. Supp. 847. An order was entered declaring § 12P "and such other portions of the chapter [112] insofar as they make specific reference thereto" void, and enjoining the defendants from enforcing them. App. 45–46; Jurisdictional Statement in No. 75–73, pp. A–33, A–34.

The majority held, *inter alia*, that appellees Mary Moe I, Doctor Zupnick, and Parents Aid had standing to challenge the operation of the statute, individually and as representatives of their proposed classes, 393 F. Supp., at 850–852,[9] and that the intervenor-appellant had standing to represent the interests of parents of unmarried minor women of childbearing age, *id.*, at 849–850. It found that "a substantial number of females under the age of 18 are capable of forming a valid consent," and viewed the overall question as "whether the state can be per-

[9] In regard to appellee Baird, the majority stated: "In the light of the unassailable standing of other plaintiffs . . . we do not pass on the question of Baird's standing." 393 F. Supp., at 851.

mitted to restrain the free exercise of that consent, to the extent that it has endeavored to do so." *Id.*, at 855.

In regard to the meaning of § 12P, the majority made the following comments:

> "1. The statute does not purport to require simply that parents be notified and given an opportunity to communicate with the minor, her chosen physician, or others. We mention this obvious fact because of the persistence of defendants and intervenor in arguing that the legislature could properly enact such a statute. Whether it could is not before us, and there is no reason for our considering it.
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> "2. The statute does not exclude those capable of forming an intelligent consent, but applies to all minors. The statute's provision calling for the minor's own consent recognizes that at least some minors can consent, but the minor's consent must be supplemented in every case, either by the consent of both parents, or by a court order.
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> . . . . .
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> "4. The statute does not purport simply to provide a check on the validity of the minor's consent and the wisdom of her decision from the standpoint of her interests alone. Rather, it recognizes and provides rights in both parents, independent of, and hence potentially at variance with, her own personal interests." 393 F. Supp., at 855.
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> "The dissent is seemingly of the opinion that a reviewing Superior Court Judge would consider only the interests of the minor. We find no room in the statute for so limited an interpretation." *Id.*, at 855 n. 10.
>
> "The parents not only must be consulted, they are given a veto." *Id.*, at 856.

The majority observed that "'neither the Four-

teenth Amendment nor the Bill of Rights is for adults alone,' In re Gault, 1967, 387 U. S. 1, 13," *ibid.*, and, accordingly, held that the State cannot control a minor's abortion in the first trimester any more than it can control that of an adult. Re-emphasizing that "the statute is cast not in terms of protecting the minor . . . but in recognizing independent rights of parents," the majority concluded that "[t]he question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own?" *Ibid.*

The majority found that in the instant situation, unlike others, the parents' interests often are adverse to those of the minor and, specifically rejecting the contrary result in *Planned Parenthood of Central Missouri* v. *Danforth*, 392 F. Supp. 1362 (ED Mo. 1975), see *ante*, p. 52, concluded:

> "But even if it should be found that parents may have rights of a Constitutional dimension vis-a-vis their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected." 393 F. Supp., at 857.

The dissent argued that the parents of Mary Moe I, by not being informed of the action or joined as parties, "have been deprived of their legal rights without due process of law," *ibid.*, that the majority erred in refusing to appoint a guardian *ad litem* for Moe I, and that it erred in finding that she had the capacity to give a valid and informed consent to an abortion. The dissent further argued that parents possess constitutionally cognizable rights in guiding the upbringing of their children, and that the statute is a proper exercise of state power in protection of those parental rights. *Id.*, at 857–865.

Most important, however, the dissent's view of the

statute differed markedly from the interpretation adopted by the majority. The dissent stated:

> "I find, therefore, no conceivable constitutional objection to legislation providing in the case of a pregnant minor an additional condition designed to make certain that she receive parental or judicial guidance and counselling before having the abortion. The requirement of consent of both parents[*] ensures that both parents will provide counselling and guidance, each according to his or her best judgment. The statute expressly provides that the parents' refusal to consent is not final. The statute expressly gives the state courts the right to make a final determination. If the state courts find that the minor is mature enough to give an informed consent to the abortion and that she has been adequately informed about the nature of an abortion and its probable consequences to her, then we must assume that the courts will enter the necessary order permitting her to exercise her constitutional right to the abortion." *Id.*, at 864.

The indicated footnote reads:

> "The majority speculate concerning possible interpretations of the 'for good cause shown' language. There is also some doubt whether the statute requires consent of one or both parents. The construction of the statute is a matter of state law. If the majority believe the only constitutional infirmities arise from their interpretation of the statute, the majority should certify questions of state law to the Supreme Judicial Court of Massachusetts pursuant to Rule 3:21 of that court in order to receive a definitive interpretation of the statute." *Id.*, at 864 n. 15.

Both appellants and intervenor-appellant appealed. We noted probable jurisdiction of each appeal and set the cases for oral argument with *Planned Parenthood of Central Missouri* v. *Danforth, ante,* p. 52, and its companion cross-appeal. 423 U. S. 982 (1975).

## III

Appellants and intervenor-appellant attack the District Court's majority decision on a number of grounds. They argue, *inter alia,* and each in their or her own way, that § 12P properly preserves the primacy of the family unit by reinforcing the role of parents in fundamental decisions affecting family members; that the District Court erred in failing to join Moe I's parents; that it abused its discretion by failing to appoint a guardian *ad litem;* and that it erred in finding the statute facially invalid when it was capable of a construction that would withstand constitutional analysis.

The interpretation placed on the statute by appellants in this Court is of some importance and merits attention, for they are the officials charged with enforcement of the statute.[10]

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[10] It is not entirely clear that appellants suggested the same interpretation in the District Court as they suggest here. See 393 F. Supp., at 855. Nevertheless, the fact that the full arguments in favor of abstention may not have been asserted in the District Court does not bar this Court's consideration of the issue. Cf. *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437 (1971).

The practice of abstention is equitable in nature, see *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, 500–501 (1941), and it would not be improper to consider the effect of delay caused by the State's failure to suggest or seek a constitutional interpretation. Cf. *Baggett* v. *Bullitt,* 377 U. S. 360, 379 (1964). In the instant case, however, there has been no injury to appellees' rights due to the delay (if any) in the appellants' coming forward with the interpretation they now espouse. As a result of the various orders of the District Court, the challenged portion of the statute has

Appellants assert, first, that under the statute parental consent may not be refused on the basis of concerns exclusively of the parent. Indeed, "the 'competing' parental right consists exclusively of the right to assess independently, for their minor child, what will serve that child's best interest. . . . [I]n operation, the parents' actual deliberation must range no further than would that of a pregnant adult making her own abortion decision." Brief for Appellants 23. And the superior court's review will ensure that parental objection based upon other considerations will not operate to bar the minor's abortion. *Id.*, at 22–23. See also Brief for Intervenor-Appellant 26.

Second, appellants argue that the last paragraph of § 12P [11] preserves the "mature minor" rule in Massachusetts, under which a child determined by a court to be capable of giving informed consent will be allowed to do so. Appellants argue that under this rule a pregnant minor could file a complaint in superior court seeking authorization for an abortion, and, "[i]mportantly, such a complaint could be filed *regardless* of whether the parents had been consulted or had withheld their consent." Brief for Appellants 37–38 (emphasis in original); Tr. of Oral Arg. 17. Appellants and the intervenor-appellant assert that the procedure employed would be struc-

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never gone into effect. Nor can we adopt the view that once a request for abstention is made, it is beyond the power of the District Court to consider possible interpretations that have not been put forth by the parties. Indeed, it would appear that abstention may be raised by the court *sua sponte*. See *Railroad Comm'n* v. *Pullman Co.*, *supra*. Cf. *England* v. *Medical Examiners*, 375 U. S. 411, 413 (1964).

[11] "Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

tured so as to be speedy and nonburdensome, and would ensure anonymity. Brief for Appellants 38 n. 30; Brief for Intervenor-Appellant 26; Tr. of Oral Arg. 24–26.

Finally, appellants argue that under § 12P, a judge of the superior court may permit an abortion without parental consent for a minor incapable of rendering informed consent, provided that there is "good cause shown." Brief for Appellants 38. "Good cause" includes a showing that the abortion is in the minor's best interests. *Id.*, at 39.

The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto." [12]

Appellees, however, on their part, take an entirely different view of the statute. They argue that the stat-

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[12] See generally *Planned Parenthood of Missouri* v. *Danforth, ante,* p. 52; *Poe* v. *Gerstein,* 517 F. 2d 787 (CA5 1975), appeal docketed, No. 75–713; *Jackson* v. *Guste,* Civ. Action No. 74–2425 (ED La. Jan. 26, 1976); *Doe* v. *Zimmerman,* 405 F. Supp. 534 (MD Pa. 1975); *Doe* v. *Exon,* Civ. Action No. CV 75–L–146 (Neb. Oct. 8, 1975); *Planned Parenthood Assn.* v. *Fitzpatrick,* 401 F. Supp. 554 (ED Pa. 1975); *Foe* v. *Vanderhoof,* 389 F. Supp. 947 (Colo. 1975); *Gary-Northwest Indiana Women's Services* v. *Bowen,* Civ. Action No. H–74–289 (ND Ind. Jan. 3, 1975); *Wolfe* v. *Schroering,* 388 F. Supp. 631 (WD Ky. 1974); *State* v. *Koome,* 84 Wash. 2d 901, 530 P. 2d 260 (1975).

ute creates a right to a parental veto,[13] that it creates an irrebuttable presumption that a minor is incapable of informed consent,[14] and that the statute does not permit abortion without parental consent in the case of a mature minor or, in the case of a minor incapable of giving consent, where the parents are irrationally opposed to abortion.[15]

Appellees specifically object to abstention. Their objection is based upon their opinion that "the statute gives to parents of minors an unbridled veto," Brief for Appellees 49, and that once that veto is exercised, the minor has the burden of proving to the superior court judge that "good cause" exists. *Ibid.* They view the "good cause" hearing as forcing the judge to choose "between the privacy rights of the young woman and the rights of the parents as established by the statute." *Ibid.* Assuming that "good cause" has a broader meaning, appellees argue that the hearing itself makes the statute unconstitutional, because of the burden it imposes and the delay it entails. *Ibid.*

## IV

In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by the Massachusetts courts. As we have held on numerous occasions, ab-

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[13] "[The statute can] force a pregnant sixteen year old to become a seventeen year old mother because her own mother wants a grandchild." Brief for Appellees 33.

[14] "[T]he parental consent statute constitutes a legislative decree that no person under age 18 is competent to consent to an abortion. This contravenes the line of decisions which have struck down certain irrebutable presumptions as violative of due process." *Id.*, at 42.

[15] "The statute has no exception for mature minors, or other minors with immature, emotionally upset parents." *Id.*, at 46.

stention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison* v. *NAACP,* 360 U. S. 167, 177 (1959). See also *Colorado River Cons. Dist.* v. *United States,* 424 U. S. 800, 813–814 (1976); *Carey* v. *Sugar,* 425 U. S. 73, 78–79 (1976); *Kusper* v. *Pontikes,* 414 U. S. 51, 54–55 (1973); *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S., at 510–511; *Zwickler* v. *Koota,* 389 U. S. 241, 249 (1967); *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941).

We do not accept appellees' assertion that the Supreme Judicial Court of Massachusetts inevitably will interpret the statute so as to create a "parental veto," require the superior court to act other than in the best interests of the minor, or impose undue burdens upon a minor capable of giving an informed consent.

In *Planned Parenthood of Central Missouri* v. *Danforth,* we today struck down a statute that created a parental veto. *Ante,* at 72–75. At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion. In this case, we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent. Without holding that a requirement of a court hearing would not unduly burden the rights of a mature adult, cf. *Doe* v. *Rampton,* 366 F. Supp. 189 (Utah 1973), we think it clear that in the instant litigation adoption of appellants' interpretation would "at least materially change the nature of the problem" that appellants claim is presented. *Harrison* v. *NAACP,* 360 U. S., at 177.

Whether the Supreme Judicial Court will so interpret

the statute, or whether it will interpret the statute to require consideration of factors not mentioned above, impose burdens more serious than those suggested, or create some unanticipated interference with the doctor-patient relationship, we cannot now determine.[16] Nor need we determine what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome. It is sufficient that the statute is susceptible of the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would. Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented.

Appellees also raise, however, a claim of impermissible distinction between the consent procedures applicable to minors in the area of abortion, and the consent required in regard to other medical procedures. This issue has come to the fore through the advent of a Massachusetts statute, enacted subsequent to the decision of the District Court, dealing with consent by minors to medical procedures other than abortion and sterilization.[17] As

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[16] As stated in n. 6, *supra*, the challenged portion of the statute has never gone into effect. The heated debate among the parties over the meaning of the statute is a strong indication of the ambiguities it contains. We assume that the Supreme Judicial Court will do everything in its power to interpret the Act in conformity with its title: "An Act to protect . . . within present constitutional limits." See *Boehning* v. *Indiana State Employees Assn.*, 423 U. S. 6 (1975).

[17] Prior to the enactment of that statute, the consent procedure in regard to abortion, at least as interpreted by appellants, was arguably merely a codification of the common law. See Brief for Appellants 24–39. The new legislation, Mass. Acts and Resolves 1975, c. 564, approved Aug. 28, 1975, reads:

"Chapter 112 of the General Laws is hereby amended by striking

we hold today in *Planned Parenthood,* however, not all distinction between abortion and other procedures is forbidden. *Ante,* at 80–81. The constitutionality of such

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out section 12F, as amended by section 1 of chapter 335 of the acts of 1971, and inserting in place thereof the following section:

"Section 12F.

"No physician, dentist or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.

"Any minor may give consent to his medical or dental care at the time such care is sought if (*i*) he is married, widowed, divorced; or (*ii*) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (*iii*) he is a member of any of the armed forces; or (*iv*) she is pregnant or believes herself to be pregnant; or (*v*) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (*vi*) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.

"Consent shall not be granted under subparagraphs (*ii*) through (*vi*), inclusive, for abortion or sterilization.

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care.

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility: (*i*) relied in good faith upon the representations of such minor that he is legally able to consent to such treatment under this section; or

distinction will depend upon its degree and the justification for it. The constitutional issue cannot now be defined, however, for the degree of distinction between the consent procedure for abortions and the consent procedures for other medical procedures cannot be established until the nature of the consent required for abortions is established. In these circumstances, the federal court should stay its hand to the same extent as in a challenge directly to the burdens created by the statute.

Finally, we note that the Supreme Judicial Court of Massachusetts has adopted a Rule of Court under which an issue of interpretation of Massachusetts law may be certified directly to that court for prompt resolution. Mass. Rules of Court, Sup. Jud. Ct. Rule 3:21 (1976). This Court often has remarked that the equitable practice of abstention is limited by considerations of " 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' " *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S., at 509, quoting *England* v. *Medical Examiners,* 375 U. S. 411, 418 (1964). See *Kusper* v. *Pontikes,* 414 U. S., at 54. As we have also noted, however, the availability of an adequate certification procedure [18] "does, of course, in the long run save time,

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(*ii*) relied in good faith upon the representations of such minor that he is over eighteen years of age.

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

[18] There is no indication that the Massachusetts certification procedure is inadequate. Indeed, the dissent in the District Court

energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers* v. *Schein,* 416 U. S. 386, 391 (1974). This Court has utilized certification procedures in the past, as have courts of appeals. *Ibid.* and cases cited therein at 390 nn. 5 and 6.

The importance of speed in resolution of the instant litigation is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis. Further, in light of our disapproval of a "parental veto" today in *Planned Parenthood,* we must assume that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, will not impose this most serious barrier. Insofar as the issue thus ceases to become one of total denial of access and becomes one rather of relative burden, the cost of abstention is reduced and the desirability of that equitable remedy accordingly increased.

## V

We therefore hold that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12P and the procedure it imposes. In regard to the claim of impermissible discrimination due to the 1975 statute, a claim not raised in the District Court but subject to inquiry through an amended complaint, or perhaps by other means, we believe that it would not be inappropriate for the District Court, when any procedural re-

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cited a prior case in which the procedure was employed with no apparent difficulty. 393 F. Supp., at 864 n. 15, citing *Hendrickson* v. *Sears,* 495 F. 2d 513 (CA1 1974).

quirement has been complied with, also to certify a question concerning the meaning of the new statute, and the extent to which its procedures differ from the procedures that must be followed under § 12P.

The judgment of the District Court is vacated, and the cases are remanded to that court for proceedings consistent with this opinion.

*It is so ordered.*

# GREGG *v.* GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 74-6257. Argued March 31, 1976—Decided July 2, 1976

Petitioner was charged with committing armed robbery and murder on the basis of evidence that he had killed and robbed two men. At the trial stage of Georgia's bifurcated procedure, the jury found petitioner guilty of two counts of armed robbery and two counts of murder. At the penalty stage, the judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count; that it was free to consider mitigating or aggravating circumstances, if any, as presented by the parties; and that it would not be authorized to consider imposing the death sentence unless it first found beyond a reasonable doubt (1) that the murder was committed while the offender was engaged in the commission of other capital felonies, *viz.*, the armed robberies of the victims; (2) that he committed the murder for the purpose of receiving the victims' money and automobile; or (3) that the murder was "outrageously and wantonly vile, horrible and inhuman" in that it "involved the depravity of [the] mind of the defendant." The jury found the first and second of these aggravating circumstances and returned a sentence of death. The Georgia Supreme Court affirmed the convictions. After reviewing the trial transcript and record and comparing the evidence and sentence in similar cases the court upheld the death sentences for the murders, concluding that they had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases, but vacated the armed robbery sentences on the ground, *inter alia*, that the death penalty had rarely been imposed in Georgia for that offense. Petitioner challenges imposition of the death sentence under the Georgia statute as "cruel and unusual" punishment under the Eighth and Fourteenth Amendments. That statute, as amended following *Furman* v. *Georgia*, 408 U. S. 238 (where this Court held to be violative of those Amendments death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty), retains the death penalty for murder and five other crimes. Guilt or innocence is determined in the first stage

of a bifurcated trial; and if the trial is by jury, the trial judge must charge lesser included offenses when supported by any view of the evidence. Upon a guilty verdict or plea a presentence hearing is held where the judge or jury hears additional extenuating or mitigating evidence and evidence in aggravation of punishment if made known to the defendant before trial. At least one of 10 specified aggravating circumstances must be found to exist beyond a reasonable doubt and designated in writing before a death sentence can be imposed. In jury cases, the trial judge is bound by the recommended sentence. In its review of a death sentence (which is automatic), the State Supreme Court must consider whether the sentence was influenced by passion, prejudice, or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." If the court affirms the death sentence it must include in its decision reference to similar cases that it has considered. *Held:* The judgment is affirmed. Pp. 168–207; 220–226; 227.

233 Ga. 117, 210 S. E. 2d 659, affirmed.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS concluded that:

(1) The punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments. Pp. 168–187.

(a) The Eighth Amendment, which has been interpreted in a flexible and dynamic manner to accord with evolving standards of decency, forbids the use of punishment that is "excessive" either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime. Pp. 169–173.

(b) Though a legislature may not impose excessive punishment, it is not required to select the least severe penalty possible, and a heavy burden rests upon those attacking its judgment. Pp. 174–176.

(c) The existence of capital punishment was accepted by the Framers of the Constitution, and for nearly two centuries this Court has recognized that capital punishment for the crime of murder is not invalid *per se*. Pp. 176–178.

(d) Legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency; and the argument that such standards require that the Eighth Amendment be construed as prohibiting the death penalty has been undercut by the fact that in the four years since *Furman, supra,* was decided, Congress and at least 35 States have enacted new statutes providing for the death penalty. Pp. 179–183.

(e) Retribution and the possibility of deterrence of capital crimes by prospective offenders are not impermissible considerations for a legislature to weigh in determining whether the death penalty should be imposed, and it cannot be said that Georgia's legislative judgment that such a penalty is necessary in some cases is clearly wrong. Pp. 183–187.

(f) Capital punishment for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime. P. 187.

2. The concerns expressed in *Furman* that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information. Pp. 188–195.

3. The Georgia statutory system under which petitioner was sentenced to death is constitutional. The new procedures on their face satisfy the concerns of *Furman,* since before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the State Supreme Court thereafter reviews the comparability of each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. Petitioner's contentions that the changes in Georgia's sentencing procedures have not removed the elements of arbitrariness and capriciousness condemned by *Furman* are without merit. Pp. 196–207.

(a) The opportunities under the Georgia scheme for affording an individual defendant mercy—whether through the prosecutor's unfettered authority to select those whom he wishes to prosecute for capital offenses and to plea bargain with them; the jury's option to convict a defendant of a lesser included offense; or the

fact that the Governor or pardoning authority may commute a death sentence—do not render the Georgia statute unconstitutional. P. 199.

(b) Petitioner's arguments that certain statutory aggravating circumstances are too broad or vague lack merit, since they need not be given overly broad constructions or have been already narrowed by judicial construction. One such provision was held impermissibly vague by the Georgia Supreme Court. Petitioner's argument that the sentencing procedure allows for arbitrary grants of mercy reflects a misinterpretation of *Furman* and ignores the reviewing authority of the Georgia Supreme Court to determine whether each death sentence is proportional to other sentences imposed for similar crimes. Petitioner also urges that the scope of the evidence and argument that can be considered at the presentence hearing is too wide, but it is desirable for a jury to have as much information as possible when it makes the sentencing decision. Pp. 200–204.

(c) The Georgia sentencing scheme also provides for automatic sentence review by the Georgia Supreme Court to safeguard against prejudicial or arbitrary factors. In this very case the court vacated petitioner's death sentence for armed robbery as an excessive penalty. Pp. 204–206.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, concluded that:

1. Georgia's new statutory scheme, enacted to overcome the constitutional deficiencies found in *Furman* v. *Georgia*, 408 U. S. 238, to exist under the old system, not only guides the jury in its exercise of discretion as to whether or not it will impose the death penalty for first-degree murder, but also gives the Georgia Supreme Court the power and imposes the obligation to decide whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion. If that court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish that the Georgia Supreme Court failed properly to perform its task in the instant case or that it is incapable of performing its task adequately in all cases. Thus the death penalty may be carried out under the Georgia legislative scheme consistently with the *Furman* decision. Pp. 220–224.

2. Petitioner's argument that the prosecutor's decisions in plea bargaining or in declining to charge capital murder are standardless and will result in the wanton or freakish imposition of the death penalty condemned in *Furman*, is without merit, for the assumption cannot be made that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts; the standards by which prosecutors decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Pp. 224–225.

3. Petitioner's argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment is untenable for the reasons stated in MR. JUSTICE WHITE's dissent in *Roberts* v. *Louisiana*, *post*, at 350–356. P. 226.

MR. JUSTICE BLACKMUN concurred in the judgment. See *Furman* v. *Georgia*, 408 U. S., at 405–414 (BLACKMUN, J., dissenting), and *id.*, at 375 (BURGER, C. J., dissenting); *id.*, at 414 (POWELL, J., dissenting); *id.*, at 465 (REHNQUIST, J., dissenting). P. 227.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by STEWART, J. BURGER, C. J., and REHNQUIST, J., filed a statement concurring in the judgment, *post*, p. 226. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 207. BLACKMUN, J., filed a statement concurring in the judgment, *post*, p. 227. BRENNAN, J., *post*, p. 227, and MARSHALL, J., *post*, p. 231, filed dissenting opinions.

*G. Hughel Harrison*, by appointment of the Court, 424 U. S. 941, argued the cause and filed a brief for petitioner.

*G. Thomas Davis*, Senior Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Chief Deputy Attorney General, *Richard L. Chambers*, Deputy Attorney General, *John B. Ballard, Jr.*, Assistant Attorney General, and *Bryant Huff*.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae*. With him on the brief was *Deputy Solicitor General Randolph*. *William E. James*, Assistant Attorney General, argued the cause for the State of California as *amicus curiae*. With him on the brief were *Evelle J. Younger*, Attorney General, and *Jack R. Winkler*, Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEWART.

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.

I

The petitioner, Troy Gregg, was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that on November 21, 1973, the petitioner and a traveling companion, Floyd Allen, while hitchhiking north in Florida were picked up by Fred Simmons and Bob Moore. Their car broke down, but they continued north after Simmons purchased another vehicle with some of the cash he was carrying. While still in Florida, they picked up another hitchhiker, Dennis Weaver, who rode with them to Atlanta, where he was let out about 11 p. m.

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**Jack Greenberg, James M. Nabrit III, Peggy C. Davis,* and *Anthony G. Amsterdam* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

*Arthur M. Michaelson* filed a brief for Amnesty International as *amicus curiae*.

A short time later the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby.

On November 23, after reading about the shootings in an Atlanta newspaper, Weaver comunicated with the Gwinnett County police and related information concerning the journey with the victims, including a description of the car. The next afternoon, the petitioner and Allen, while in Simmons' car, were arrested in Asheville, N. C. In the search incident to the arrest a .25-caliber pistol, later shown to be that used to kill Simmons and Moore, was found in the petitioner's pocket. After receiving the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and signing a written waiver of his rights, the petitioner signed a statement in which he admitted shooting, then robbing Simmons and Moore. He justified the slayings on grounds of self-defense. The next day, while being transferred to Lawrenceville, Ga., the petitioner and Allen were taken to the scene of the shootings. Upon arriving there, Allen recounted the events leading to the slayings. His version of these events was as follows: After Simmons and Moore left the car, the petitioner stated that he intended to rob them. The petitioner then took his pistol in hand and positioned himself on the car to improve his aim. As Simmons and Moore came up an embankment toward the car, the petitioner fired three shots and the two men fell near a ditch. The petitioner, at close range, then fired a shot into the head of each. He robbed them of valuables and drove away with Allen.

A medical examiner testified that Simmons died from a bullet wound in the eye and that Moore died from bullet wounds in the cheek and in the back of the head. He further testified that both men had several bruises

and abrasions about the face and head which probably were sustained either from the fall into the ditch or from being dragged or pushed along the embankment. Although Allen did not testify, a police detective recounted the substance of Allen's statements about the slayings and indicated that directly after Allen had made these statements the petitioner had admitted that Allen's account was accurate. The petitioner testified in his own defense. He confirmed that Allen had made the statements described by the detective, but denied their truth or ever having admitted to their accuracy. He indicated that he had shot Simmons and Moore because of fear and in self-defense, testifying they had attacked Allen and him, one wielding a pipe and the other a knife.[1]

The trial judge submitted the murder charges to the jury on both felony-murder and nonfelony-murder theories. He also instructed on the issue of self-defense but declined to instruct on manslaughter. He submitted the robbery case to the jury on both an armed-robbery theory and on the lesser included offense of robbery by intimidation. The jury found the petitioner guilty of two counts of armed robbery and two counts of murder.

At the penalty stage, which took place before the same jury, neither the prosecutor nor the petitioner's lawyer offered any additional evidence. Both counsel, however, made lengthy arguments dealing generally with the propriety of capital punishment under the circumstances and with the weight of the evidence of guilt. The trial judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count.

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[1] On cross-examination the State introduced a letter written by the petitioner to Allen entitled, "[a] statement for you," with the instructions that Allen memorize and then burn it. The statement was consistent with the petitioner's testimony at trial.

The judge further charged the jury that in determining what sentence was appropriate the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.

Finally, the judge instructed the jury that it "would not be authorized to consider [imposing] the penalty of death" unless it first found beyond a reasonable doubt one of these aggravating circumstances:

> "One—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].
>
> "Two—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> "Three—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [*sic*] involved the depravity of [the] mind of the defendant." Tr. 476–477.

Finding the first and second of these circumstances, the jury returned verdicts of death on each count.

The Supreme Court of Georgia affirmed the convictions and the imposition of the death sentences for murder. 233 Ga. 117, 210 S. E. 2d 659 (1974). After reviewing the trial transcript and the record, including the evidence, and comparing the evidence and sentence in similar cases in accordance with the requirements of Georgia law, the court concluded that, considering the nature of the crime and the defendant, the sentences of death had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases.[2] The death

[2] The court further held, in part, that the trial court did not err in refusing to instruct the jury with respect to voluntary manslaughter since there was no evidence to support that verdict.

sentences imposed for armed robbery, however, were vacated on the grounds that the death penalty had rarely been imposed in Georgia for that offense and that the jury improperly considered the murders as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murders. *Id.*, at 127, 210 S. E. 2d, at 667.

We granted the petitioner's application for a writ of certiorari limited to his challenge to the imposition of the death sentences in this case as "cruel and unusual" punishment in violation of the Eighth and the Fourteenth Amendments. 423 U. S. 1082 (1976).

## II

Before considering the issues presented it is necessary to understand the Georgia statutory scheme for the imposition of the death penalty.[3] The Georgia statute, as amended after our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), retains the death penalty for six categories of crime: murder,[4] kidnaping for ransom or where

[3] Subsequent to the trial in this case limited portions of the Georgia statute were amended. None of these amendments changed significantly the substance of the statutory scheme. All references to the statute in this opinion are to the current version.

[4] Georgia Code Ann. § 26–1101 (1972) provides:

"(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life."

the victim is harmed, armed robbery,[5] rape, treason, and aircraft hijacking.[6] Ga. Code Ann. §§ 26–1101, 26–1311, 26–1902, 26–2001, 26–2201, 26–3301 (1972). The capital defendant's guilt or innocence is determined in the traditional manner, either by a trial judge or a jury, in the first stage of a bifurcated trial.

If trial is by jury, the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence. *Sims* v. *State*, 203 Ga. 668, 47 S. E. 2d 862 (1948). See *Linder* v. *State*, 132 Ga. App. 624, 625, 208 S. E. 2d 630, 631 (1974). After a verdict, finding, or plea of guilty to a capital crime, a presentence hearing is conducted before whoever made the determination of guilt. The sentencing procedures are essentially the same in both bench and jury trials. At the hearing:

> "[T]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that

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[5] Section 26–1902 (1972) provides:

"A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

[6] These capital felonies currently are defined as they were when *Furman* was decided. The 1973 amendments to the Georgia statute, however, narrowed the class of crimes potentially punishable by death by eliminating capital perjury. Compare § 26–2401 (Supp. 1975) with § 26–2401 (1972).

> only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge [or jury] shall also hear argument by the defendant or his counsel and the prosecuting attorney . . . regarding the punishment to be imposed." § 27–2503 (Supp. 1975).

The defendant is accorded substantial latitude as to the types of evidence that he may introduce. See *Brown* v. *State*, 235 Ga. 644, 647–650, 220 S. E. 2d 922, 925–926 (1975).[7] Evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted. *Eberheart* v. *State*, 232 Ga. 247, 253, 206 S. E. 2d 12, 17 (1974).[8]

In the assessment of the appropriate sentence to be imposed the judge is also required to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. . . ." § 27–2534.1 (b) (Supp. 1975). The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances speci-

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[7] It is not clear whether the 1974 amendments to the Georgia statute were intended to broaden the types of evidence admissible at the presentence hearing. Compare § 27–2503 (a) (Supp. 1975) with § 27–2534 (1972) (deletion of limitation "subject to the laws of evidence").

[8] Essentially the same procedures are followed in the case of a guilty plea. The judge considers the factual basis of the plea, as well as evidence in aggravation and mitigation. See *Mitchell* v. *State*, 234 Ga. 160, 214 S. E. 2d 900 (1975).

fied in the statute.[9] The sentence of death may be imposed only if the jury (or judge) finds one of the statutory aggravating circumstances and then elects to

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[9] The statute provides in part:

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace

impose that sentence. § 26–3102 (Supp. 1975). If the verdict is death, the jury or judge must specify the aggravating circumstance(s) found. § 27–2534.1 (c) (Supp. 1975). In jury cases, the trial judge is bound by the jury's recommended sentence. §§ 26–3102, 27–2514 (Supp. 1975).

In addition to the conventional appellate process available in all criminal cases, provision is made for special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death in the particular case. The court is directed to consider "the punishment as well as any errors enumerated by way of appeal," and to determine:

"(1) Whether the sentence of death was imposed

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officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27–2534.1 (b) is so found, the death penalty shall not be imposed." § 27–2534.1 (Supp. 1975).

The Supreme Court of Georgia, in *Arnold* v. *State*, 236 Ga. 534, 540, 224 S. E. 2d 386, 391 (1976), recently held unconstitutional the portion of the first circumstance encompassing persons who have a "substantial history of serious assaultive criminal convictions" because it did not set "sufficiently 'clear and objective standards.'"

under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27.2534.1 (b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 27–2537 (Supp. 1975).

If the court affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration. § 27–2537 (e) (Supp. 1975).[10]

A transcript and complete record of the trial, as well as a separate report by the trial judge, are transmitted to the court for its use in reviewing the sentence. § 27–2537 (a) (Supp. 1975). The report is in the form of a 6½-page questionnaire, designed to elicit information about the defendant, the crime, and the circumstances of the trial. It requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality of sentence. Included in the report are responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and, whether, in the trial court's judgment, there was any doubt about

[10] The statute requires that the Supreme Court of Georgia obtain and preserve the records of all capital felony cases in which the death penalty was imposed after January 1, 1970, or such earlier date that the court considers appropriate. § 27–2537 (f) (Supp. 1975). To aid the court in its disposition of these cases the statute further provides for the appointment of a special assistant and authorizes the employment of additional staff members. §§ 27–2537 (f)–(h) (Supp. 1975).

the defendant's guilt or the appropriateness of the sentence. A copy of the report is served upon defense counsel. Under its special review authority, the court may either affirm the death sentence or remand the case for resentencing. In cases in which the death sentence is affirmed there remains the possibility of executive clemency.[11]

## III

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. In Part IV of this opinion, we will consider the sentence of death imposed under the Georgia statutes at issue in this case.

The Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment.[12] But until *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and

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[11] See Ga. Const., Art. 5, § 1, ¶ 12, Ga. Code Ann. § 2-3011 (1973); Ga. Code Ann. §§ 77-501, 77-511, 77-513 (1973 and Supp. 1975) (Board of Pardons and Paroles is authorized to commute sentence of death except in cases where Governor refuses to suspend that sentence).

[12] *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947); *In re Kemmler*, 136 U. S. 436, 447 (1890); *Wilkerson* v. *Utah*, 99 U. S. 130, 134-135 (1879). See also *McGautha* v. *California*, 402 U. S. 183 (1971); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968); *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion).

unusual punishment in violation of the Constitution. Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional *per se*;[13] two Justices would have reached the opposite conclusion;[14] and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed.[15] We now hold that the punishment of death does not invariably violate the Constitution.

A

The history of the prohibition of "cruel and unusual" punishment already has been reviewed at length.[16] The phrase first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 852–853 (1969). The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved. *Id.*, at 860. The

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[13] 408 U. S., at 375 (BURGER, C. J., dissenting); *id.*, at 405 (BLACKMUN, J., dissenting); *id.*, at 414 (POWELL, J., dissenting); *id.*, at 465 (REHNQUIST, J., dissenting).

[14] *Id.*, at 257 (BRENNAN, J., concurring); *id.*, at 314 (MARSHALL, J., concurring).

[15] *Id.*, at 240 (Douglas, J., concurring); *id.*, at 306 (STEWART, J., concurring); *id.*, at 310 (WHITE, J., concurring).

Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds—MR. JUSTICE STEWART and MR. JUSTICE WHITE. See n. 36, *infra*.

[16] 408 U. S., at 316–328 (MARSHALL, J., concurring).

American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned, however, with proscribing "tortures" and other "barbarous" methods of punishment." *Id.*, at 842.[17]

In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to "torture" and other "barbarous" methods. See *Wilkerson* v. *Utah*, 99 U. S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . ."); *In re Kemmler*, 136 U. S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . ."). See also *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947) (second attempt at electrocution found not to violate

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[17] This conclusion derives primarily from statements made during the debates in the various state conventions called to ratify the Federal Constitution. For example, Virginia delegate Patrick Henry objected vehemently to the lack of a provision banning "cruel and unusual punishments":

"What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime." 3 J. Elliot, Debates 447–448 (1863).

A similar objection was made in the Massachusetts convention: "They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." 2 Elliot, *supra*, at 111.

Eighth Amendment, since failure of initial execution attempt was "an unforeseeable accident" and "[t]here [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution").

But the Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States*, 217 U. S. 349, 373 (1910). Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.*, at 378. See also *Furman* v. *Georgia*, 408 U. S., at 429–430 (POWELL, J., dissenting); *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958) (plurality opinion).

In *Weems* the Court addressed the constitutionality of the Philippine punishment of *cadena temporal* for the crime of falsifying an official document. That punishment included imprisonment for at least 12 years and one day, in chains, at hard and painful labor; the loss of many basic civil rights; and subjection to lifetime surveillance. Although the Court acknowledged the possibility that "the cruelty of pain" may be present in the challenged punishment, 217 U. S., at 366, it did not rely on that factor, for it rejected the proposition that the Eighth Amendment reaches only punishments that are "inhuman and barbarous, torture and the like." *Id.*, at 368. Rather, the Court focused on the lack of proportion between the crime and the offense:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice

> of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.*, at 366–367.[18]

Later, in *Trop* v. *Dulles*, *supra*, the Court reviewed the constitutionality of the punishment of denationalization imposed upon a soldier who escaped from an Army stockade and became a deserter for one day. Although the concept of proportionality was not the basis of the holding, the plurality observed in dicta that "[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime." 356 U. S., at 100.

The substantive limits imposed by the Eighth Amendment on what can be made criminal and punished were discussed in *Robinson* v. *California*, 370 U. S. 660 (1962). The Court found unconstitutional a state statute that made the status of being addicted to a narcotic drug a criminal offense. It held, in effect, that it is "cruel and unusual" to impose any punishment at all for the mere status of addiction. The cruelty in the abstract of the actual sentence imposed was irrelevant: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667. Most recently, in *Furman* v. *Georgia*, *supra*, three Justices in separate concurring opinions found the Eighth Amendment applicable to procedures employed to select convicted defendants for the sentence of death.

It is clear from the foregoing precedents that the

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[18] The Court remarked on the fact that the law under review "has come to us from a government of a different form and genius from ours," but it also noted that the punishments it inflicted "would have those bad attributes even if they were found in a Federal enactment and not taken from an alien source." 217 U. S., at 377.

Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles, supra,* at 101. See also *Jackson* v. *Bishop,* 404 F. 2d 571, 579 (CA8 1968). Cf. *Robinson* v. *California, supra,* at 666. Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. As we develop below more fully, see *infra,* at 175–176, this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop* v. *Dulles, supra,* at 100 (plurality opinion). This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. *Furman* v. *Georgia, supra,* at 392–393 (BURGER, C. J., dissenting). See *Wilkerson* v. *Utah,* 99 U. S., at 136; *Weems* v. *United States, supra,* at 381. Second, the punishment must not be grossly out of proportion to the severity of the crime. *Trop* v. *Dulles, supra,* at 100 (plurality opinion) (dictum); *Weems* v. *United States, supra,* at 367.

B

Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.

> "Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not." *Furman* v. *Georgia*, 408 U. S., at 313–314 (WHITE, J., concurring).

See also *id.*, at 433 (POWELL, J., dissenting).[19]

But, while we have an obligation to insure that con-

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[19] Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power. See *Weems* v. *United States*, 217 U. S. 349, 371–373 (1910); *Furman* v. *Georgia*, 408 U. S., at 258–269 (BRENNAN, J., concurring). *Robinson* v. *California*, 370 U. S. 660 (1962), illustrates the proposition that penal laws enacted by state legislatures may violate the Eighth Amendment because "in the light of contemporary human knowledge" they "would doubtless be universally thought to be an infliction of cruel and unusual punishment." *Id.*, at 666. At the time of *Robinson* nine States in addition to California had criminal laws that punished addiction similar to the law declared unconstitutional in *Robinson*. See Brief for Appellant in *Robinson* v. *California*, O. T. 1961, No. 554, p. 15.

stitutional bounds are not overreached, we may not act as judges as we might as legislators.

> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis* v. *United States,* 341 U. S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).[20]

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."

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[20] See also *Furman* v. *Georgia, supra,* at 411 (BLACKMUN, J., dissenting):

"We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great."

*Furman* v. *Georgia, supra,* at 383 (BURGER, C. J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system, 408 U. S., at 465–470 (REHNQUIST, J., dissenting), is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." *Gore* v. *United States,* 357 U. S. 386, 393 (1958). Cf. *Robinson* v. *California,* 370 U. S., at 664–665; *Trop* v. *Dulles,* 356 U. S., at 103 (plurality opinion); *In re Kemmler,* 136 U. S., at 447. Caution is necessary lest this Court become, "under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country." *Powell* v. *Texas,* 392 U. S. 514, 533 (1968) (plurality opinion). A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience. See *Furman* v. *Georgia, supra,* at 461–462 (POWELL, J., dissenting).

C

In the discussion to this point we have sought to identify the principles and considerations that guide a court in addressing an Eighth Amendment claim. We now consider specifically whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question.

The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule

imposed a mandatory death sentence on all convicted murderers. *McGautha* v. *California*, 402 U. S. 183, 197–198 (1971). And the penalty continued to be used into the 20th century by most American States, although the breadth of the common-law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy. *Id.*, at 199–200. See *Woodson* v. *North Carolina*, *post*, at 289–292.

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. C. 9, 1 Stat. 112 (1790). The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

And the Fourteenth Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of "life, liberty, or property" without due process of law.

For nearly two centuries, this Court, repeatedly and

often expressly, has recognized that capital punishment is not invalid *per se*. In *Wilkerson* v. *Utah*, 99 U. S., at 134–135, where the Court found no constitutional violation in inflicting death by public shooting, it said:

> "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment."

Rejecting the contention that death by electrocution was "cruel and unusual," the Court in *In re Kemmler*, *supra*, at 447, reiterated:

> "[T]he punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Again, in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 464, the Court remarked: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." And in *Trop* v. *Dulles*, 356 U. S., at 99, Mr. Chief Justice Warren, for himself and three other Justices, wrote:

> "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Four years ago, the petitioners in *Furman* and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime regardless of its depravity and impact on society. This view was accepted by two Justices.[21] Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid.[22]

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States[23] have enacted new statutes that provide for the

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[21] See concurring opinions of MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, 408 U. S., at 257 and 314.

[22] See concurring opinions of Mr. Justice Douglas, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, *id.*, at 240, 306, and 310.

[23] Ala. H. B. 212, §§ 2–4, 6–7 (1975); Ariz. Rev. Stat. Ann. §§ 13–452 to 13–454 (Supp. 1973); Ark. Stat. Ann. § 41–4706 (Supp. 1975); Cal. Penal Code §§ 190.1, 209, 219 (Supp. 1976); Colo.

death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death.[24] These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post-*Furman* statutes make clear that capital punish-

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Laws 1974, c. 52, § 4; Conn. Gen. Stat. Rev. §§ 53a–25, 53a–35 (b), 53a–46a, 53a–54b (1975); Del. Code Ann. tit. 11, § 4209 (Supp. 1975); Fla. Stat. Ann. §§ 782.04, 921.141 (Supp. 1975–1976); Ga. Code Ann. §§ 26–3102, 27–2528, 27–2534.1, 27–2537 (Supp. 1975); Idaho Code § 18–4004 (Supp. 1975); Ill. Ann. Stat. c. 38, §§ 9–1, 1005–5–3, 1005–8–1A (Supp. 1976–1977); Ind. Stat. Ann. § 35–13–4–1 (1975); Ky. Rev. Stat. Ann. § 507.020 (1975); La. Rev. Stat. Ann. § 14:30 (Supp. 1976); Md. Ann. Code, art. 27, § 413 (Supp. 1975); Miss. Code Ann. §§ 97–3–19, 97–3–21, 97–25–55, 99–17–20 (Supp. 1975); Mo. Ann. Stat. § 559.009, 559.005 (Supp. 1976); Mont. Rev. Codes Ann. § 94–5–105 (Spec. Crim. Code Supp. 1976); Neb. Rev. Stat. §§ 28–401, 29–2521 to 29–2523 (1975); Nev. Rev. Stat. § 200.030 (1973); N. H. Rev. Stat. Ann. § 630:1 (1974); N. M. Stat. Ann. § 40A–29–2 (Supp. 1975); N. Y. Penal Law § 60.06 (1975); N. C. Gen. Stat. § 14–17 (Supp. 1975); Ohio Rev. Code Ann. §§ 2929.02–2929.04 (1975); Okla. Stat. Ann. tit. 21, § 701.1–701.3 (Supp. 1975–1976); Pa. Laws 1974, Act. No. 46; R. I. Gen. Laws Ann. § 11–23–2 (Supp. 1975); S. C. Code Ann. § 16–52 (Supp. 1975); Tenn. Code Ann. §§ 39–2402, 39–2406 (1975); Tex. Penal Code Ann. § 19.03 (a) (1974); Utah Code Ann. §§ 76–3–206, 76–3–207, 76–5–202 (Supp. 1975); Va. Code Ann. §§ 18.2–10, 18.2–31 (1976); Wash. Rev. Code §§ 9A.–32.045, 9A.32.046 (Supp. 1975); Wyo. Stat. Ann. § 6–54 (Supp. 1975).

[24] Antihijacking Act of 1974, 49 U. S. C. §§ 1472 (i), (n) (1970 ed., Supp. IV).

ment itself has not been rejected by the elected representatives of the people.

In the only statewide referendum occurring since *Furman* and brought to our attention, the people of California adopted a constitutional amendment that authorized capital punishment, in effect negating a prior ruling by the Supreme Court of California in *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880, cert. denied, 406 U. S. 958 (1972), that the death penalty violated the California Constitution.[25]

The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. See *Furman* v. *Georgia*, 408 U. S., at 439–440 (POWELL, J., dissenting). See generally Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1 (1966). The Court has said that "one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system." *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 n. 15 (1968). It may be true that evolving standards have influenced juries in

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[25] In 1968, the people of Massachusetts were asked "Shall the commonwealth . . . retain the death penalty for crime?" A substantial majority of the ballots cast answered "Yes." Of 2,348,005 ballots cast, 1,159,348 voted "Yes," 730,649 voted "No," and 458,008 were blank. See *Commonwealth* v. *O'Neal*, — Mass. —, —, and n. 1, 339 N. E. 2d 676, 708, and n. 1 (1975) (Reardon, J., dissenting). A December 1972 Gallup poll indicated that 57% of the people favored the death penalty, while a June 1973 Harris survey showed support of 59%. Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan. L. Rev. 1245, 1249 n. 22 (1974). In a December 1970 referendum, the voters of Illinois also rejected the abolition of capital punishment by 1,218,791 votes to 676,302 votes. Report of the Governor's Study Commission on Capital Punishment 43 (Pa. 1973).

recent decades to be more discriminating in imposing the sentence of death.[26] But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. See *Furman* v. *Georgia*, *supra*, at 388 (BURGER, C. J., dissenting). Indeed, the actions of juries in many States since *Furman* are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since *Furman*,[27] and by the end of March 1976, more than 460 persons were subject to death sentences.

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. *Trop* v. *Dulles*, 356 U. S., at 100 (plurality opinion). Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of

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[26] The number of prisoners who received death sentences in the years from 1961 to 1972 varied from a high of 140 in 1961 to a low of 75 in 1972, with wide fluctuations in the intervening years: 103 in 1962; 93 in 1963; 106 in 1964; 86 in 1965; 118 in 1966; 85 in 1967; 102 in 1968; 97 in 1969; 127 in 1970; and 104 in 1971. Department of Justice, National Prisoner Statistics Bulletin, Capital Punishment 1971–1972, p. 20 (Dec. 1974). It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment. See *Woodson* v. *North Carolina*, *post*, at 295–296, n. 31.

[27] Department of Justice, National Prisoner Statistics Bulletin, Capital Punishment 1974, pp. 1, 26–27 (Nov. 1975).

penology," *Furman* v. *Georgia, supra,* at 451 (POWELL, J., dissenting), the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering. Cf. *Wilkerson* v. *Utah,* 99 U. S., at 135–136; *In re Kemmler,* 136 U. S., at 447.

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.[28]

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct.[29] This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." *Furman* v. *Georgia, supra,* at 308 (STEWART, J., concurring).

"Retribution is no longer the dominant objective of the criminal law," *Williams* v. *New York,* 337 U. S. 241, 248 (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.

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[28] Another purpose that has been discussed is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future. See *People* v. *Anderson,* 6 Cal. 3d 628, 651, 493 P. 2d 880, 896, cert. denied, 406 U. S. 958 (1972); *Commonwealth* v. *O'Neal, supra,* at —, 339 N. E. 2d, at 685–686.

[29] See H. Packer, Limits of the Criminal Sanction 43–44 (1968).

*Furman* v. *Georgia*, 408 U. S., at 394–395 (BURGER, C. J., dissenting); *id.*, at 452–454 (POWELL, J., dissenting); *Powell* v. *Texas*, 392 U. S., at 531 535–536 (plurality opinion). Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[30]

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate.[31] The results

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[30] Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, spoke to this effect before the British Royal Commission on Capital Punishment:

"Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not." Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p. 207 (1950).

A contemporary writer has noted more recently that opposition to capital punishment "has much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes, so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response." Raspberry, Death Sentence, The Washington Post, Mar. 12, 1976, p. A27, cols. 5–6.

[31] See, *e. g.*, Peck, The Deterrent Effect of Capital Punishment: Ehrlich and His Critics, 85 Yale L. J. 359 (1976); Baldus & Cole, A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 170 (1975); Bowers & Pierce, The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment, 85 Yale L. J. 187 (1975);

simply have been inconclusive. As one opponent of capital punishment has said:

> "[A]fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this 'deterrent' effect may be . . . .
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> "The inescapable flaw is . . . that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A 'scientific'—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out of this tangle suggests itself." C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 25–26 (1974).

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties,[32] there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a signifi-

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Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975); Hook, The Death Sentence, in The Death Penalty in America 146 (H. Bedau ed. 1967); T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (1959).

[32] See, *e. g.*, The Death Penalty in America, *supra*, at 258–332; Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932.

cant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.[33] And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.[34]

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. *Furman* v. *Georgia*, *supra*, at 403–405 (BURGER, C. J., dissenting). Indeed, many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature

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[33] Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime.

[34] We have been shown no statistics breaking down the total number of murders into the categories described above. The overall trend in the number of murders committed in the nation, however, has been upward for some time. In 1964, reported murders totaled an estimated 9,250. During the ensuing decade, the number reported increased 123%, until it totaled approximately 20,600 in 1974. In 1972, the year *Furman* was announced, the total estimated was 18,520. Despite a fractional decrease in 1975 as compared with 1974, the number of murders increased in the three years immediately following *Furman* to approximately 20,400, an increase of almost 10%. See FBI, Uniform Crime Reports, for 1964, 1972, 1974, and 1975, Preliminary Annual Release.

to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed. There is no question that death as a punishment is unique in its severity and irrevocability. *Furman* v. *Georgia*, 408 U. S., at 286–291 (BRENNAN, J., concurring); *id.*, at 306 (STEWART, J., concurring). When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. *Powell* v. *Alabama*, 287 U. S. 45, 71 (1932); *Reid* v. *Covert*, 354 U. S. 1, 77 (1957) (Harlan, J., concurring in result). But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender,[35] we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

## IV

We now consider whether Georgia may impose the death penalty on the petitioner in this case.

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[35] We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life—for example, when capital punishment is imposed for rape, kidnaping, or armed robbery that does not result in the death of any human being.

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While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. MR. JUSTICE WHITE concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U. S., at 313 (concurring). Indeed, the death sentences examined by the Court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.*, at 309–310 (STEWART, J., concurring).[36]

[36] This view was expressed by other Members of the Court who concurred in the judgments. See 408 U. S., at 255–257 (Douglas, J.); *id.*, at 291–295 (BRENNAN, J.). The dissenters viewed this concern as the basis for the *Furman* decision: "The decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce even-handed justice; . . . that the selection process has followed no rational pattern." *Id.*, at 398–399 (BURGER, C. J., dissenting).

*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937). See also *Williams* v. *Oklahoma*, 358 U. S. 576, 585 (1959); *Williams* v. *New York*, 337 U. S., at 247.[37] Otherwise, "the system cannot function in a consistent and a rational manner." American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.1 (a), Commentary, p. 201 (App. Draft 1968). See also President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 144 (1967); ALI, Model Penal Code § 7.07, Comment 1, pp. 52–53 (Tent. Draft No. 2, 1954).[38]

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[37] The Federal Rules of Criminal Procedure require as a matter of course that a presentence report containing information about a defendant's background be prepared for use by the sentencing judge. Rule 32 (c). The importance of obtaining accurate sentencing information is underscored by the Rule's direction to the sentencing court to "afford the defendant or his counsel an opportunity to comment [on the report] and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." Rule 32 (c)(3)(A).

[38] Indeed, we hold elsewhere today that in capital cases it is constitutionally required that the sentencing authority have information

The cited studies assumed that the trial judge would be the sentencing authority. If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' " [39] But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question.[40] This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure—one in which the

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sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence. See *Woodson* v. *North Carolina*, *post*, at 303–305.

[39] *Witherspoon* v. *Illinois*, 391 U. S., at 519 n. 15, quoting *Trop* v. *Dulles*, 356 U. S., at 101 (plurality opinion). See also Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 571.

[40] In other situations this Court has concluded that a jury cannot be expected to consider certain evidence before it on one issue, but not another. See, *e. g.*, *Bruton* v. *United States*, 391 U. S. 123 (1968); *Jackson* v. *Denno*, 378 U. S. 368 (1964).

question of sentence is not considered until the determination of guilt has been made—is the best answer. The drafters of the Model Penal Code concluded:

> "[If a unitary proceeding is used] the determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt.
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> ". . . The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing sentence." ALI, Model Penal Code § 201.6, Comment 5, pp. 74–75 (Tent. Draft No. 9, 1959).

See also *Spencer* v. *Texas*, 385 U. S. 554, 567–569 (1967); Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶¶ 555, 574; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099, 1135–1136 (1953). When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifur-

cated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.[41]

But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. See American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures, § 1.1 (b), Commentary, pp. 46–47 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967). To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

The idea that a jury should be given guidance in its

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[41] In *United States* v. *Jackson*, 390 U. S. 570 (1968), the Court considered a statute that provided that if a defendant pleaded guilty, the maximum penalty would be life imprisonment, but if a defendant chose to go to trial, the maximum penalty upon conviction was death. In holding that the statute was constitutionally invalid, the Court noted:

"The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." *Id.*, at 581.

decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law.[42] See *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 498 (1931); Fed. Rule Civ. Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate,[43] the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959) (emphasis in original).[44] While such standards are by

[42] But see Md. Const., Art. XV, § 5: "In the trial of all criminal cases, the jury shall be the Judges of the Law, as well as of fact . . . ." See also Md. Code Ann., art. 27, § 593 (1971). Maryland judges, however, typically give advisory instructions on the law to the jury. See Md. Rule 756; *Wilson* v. *State*, 239 Md. 245, 210 A. 2d 824 (1965).

[43] See *McGautha* v. *California*, 402 U. S., at 204–207; Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 595.

[44] The Model Penal Code proposes the following standards:

"(3) Aggravating Circumstances.

"(a) The murder was committed by a convict under sentence of imprisonment.

[*Footnote 44 is continued on p. 194*]

necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be

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"(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

"(c) At the time the murder was committed the defendant also committed another murder.

"(d) The defendant knowingly created a great risk of death to many persons.

"(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

"(g) The murder was committed for pecuniary gain.

"(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

"(4) Mitigating Circumstances.

"(a) The defendant has no significant history of prior criminal activity.

"(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

"(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

"(f) The defendant acted under duress or under the domination of another person.

"(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

"(h) The youth of the defendant at the time of the crime." ALI Model Penal Code § 210.6 (Proposed Official Draft 1962).

called capricious or arbitrary.[45] Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*,[46] for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman*'s constitutional concerns.[47]

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[45] As MR. JUSTICE BRENNAN noted in *McGautha* v. *California*, *supra*, at 285–286 (dissenting opinion):

"[E]ven if a State's notion of wise capital sentencing policy is such that the policy cannot be implemented through a formula capable of mechanical application . . . there is no reason that it should not give some guidance to those called upon to render decision."

[46] A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.

[47] In *McGautha* v. *California*, *supra*, this Court held that the

## B

We now turn to consideration of the constitutionality of Georgia's capital-sentencing procedures. In the wake of *Furman*, Georgia amended its capital punishment statute, but chose not to narrow the scope of its murder provisions. See Part II, *supra*. Thus, now as before *Furman*, in Georgia "[a] person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." Ga. Code Ann., § 26–1101 (a) (1972). All persons convicted of murder "shall be punished by death or by imprisonment for life." § 26–1101 (c) (1972).

Georgia did act, however, to narrow the class of murderers subject to capital punishment by specifying 10

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Due Process Clause of the Fourteenth Amendment did not require that a jury be provided with standards to guide its decision whether to recommend a sentence of life imprisonment or death or that the capital-sentencing proceeding be separated from the guilt-determination process. *McGautha* was not an Eighth Amendment decision, and to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman* v. *Georgia*. There the Court ruled that death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments. While *Furman* did not overrule *McGautha*, it is clearly in substantial tension with a broad reading of *McGautha*'s holding. In view of *Furman*, *McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause. We note that *McGautha*'s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed.[48] In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. § 27–2534.1 (b) (Supp. 1975). The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, see § 27–2302 (Supp. 1975), but it must find a *statutory* aggravating circumstance before recommending a sentence of death.

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (*e. g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the crime).[49] As a result, while

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[48] The text of the statute enumerating the various aggravating circumstances is set out at n. 9, *supra*.

[49] See *Moore* v. *State*, 233 Ga. 861, 865, 213 S. E. 2d 829, 832 (1975).

some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." *Coley* v. *State*, 231 Ga. 829, 834, 204 S. E. 2d 612, 615 (1974).

As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases. § 27–2537 (c) (Supp. 1975).

In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." 408 U. S., at 313 (WHITE, J., concurring).

The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia—both in traditional practices that still remain and in the new sentencing procedures adopted in response to *Furman*.

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First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman,* in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.[50]

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[50] The petitioner's argument is nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they

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The petitioner further contends that the capital-sentencing procedures adopted by Georgia in response to *Furman* do not eliminate the dangers of arbitrariness and caprice in jury sentencing that were held in *Furman* to be violative of the Eighth and Fourteenth Amendments. He claims that the statute is so broad and vague as to leave juries free to act as arbitrarily and capriciously as they wish in deciding whether to impose the death penalty. While there is no claim that the jury in this case relied upon a vague or overbroad provision to establish the existence of a statutory aggravating circumstance, the petitioner looks to the sentencing system as a whole (as the Court did in *Furman* and we do today) and argues that it fails to reduce sufficiently the risk of arbitrary infliction of death sentences. Specifically, Gregg urges that the statutory aggravating circumstances are too broad and too vague, that the sentencing procedure allows for arbitrary grants of mercy, and that the scope of the evidence and argument that can be considered at the presentence hearing is too wide.

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refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson* v. *North Carolina*, *post*, p. 280, and *Roberts* v. *Louisiana*, *post*, p. 325. The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment. In the federal system it also would be unconstitutional to prohibit a President from deciding, as an act of executive clemency, to reprieve one sentenced to death. U. S. Const., Art. II, § 2.

The petitioner attacks the seventh statutory aggravating circumstance, which authorizes imposition of the death penalty if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," contending that it is so broad that capital punishment could be imposed in any murder case.[51] It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.[52] In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh, see *McCorquodale* v. *State*, 233 Ga. 369, 211 S. E. 2d 577 (1974), and that homicide was a horrifying torture-murder.[53]

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[51] In light of the limited grant of certiorari, see *supra*, at 162, we review the "vagueness" and "overbreadth" of the statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing system invalid under the Eighth and Fourteenth Amendments because it is incapable of imposing capital punishment other than by arbitrariness or caprice.

[52] In the course of interpreting Florida's new capital-sentencing statute, the Supreme Court of Florida has ruled that the phrase "especially heinous, atrocious or cruel" means a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State* v. *Dixon*, 283 So. 2d 1, 9 (1973). See *Proffitt* v. *Florida*, *post*, at 255–256.

[53] Two other reported cases indicate that juries have found aggravating circumstances based on § 27-2534.1 (b)(7). In both cases a separate statutory aggravating circumstance was also found, and the Supreme Court of Georgia did not explicitly rely on the finding of the seventh circumstance when it upheld the death sentence. See *Jarrell* v. *State*, 234 Ga. 410, 216 S. E. 2d 258 (1975) (State Supreme Court upheld finding that defendant committed two other capital felonies—kidnaping and armed robbery—in the course of

The petitioner also argues that two of the statutory aggravating circumstances are vague and therefore susceptible of widely differing interpretations, thus creating a substantial risk that the death penalty will be arbitrarily inflicted by Georgia juries.[54] In light of the decisions of the Supreme Court of Georgia we must disagree. First, the petitioner attacks that part of § 27–2534.1 (b)(1) that authorizes a jury to consider whether a defendant has a "substantial history of serious assaultive criminal convictions." The Supreme Court of Georgia, however, has demonstrated a concern that the new sentencing procedures provide guidance to juries. It held this provision to be impermissibly vague in *Arnold* v. *State*, 236 Ga. 534, 540, 224 S. E. 2d 386, 391 (1976), because it did not provide the jury with "sufficiently 'clear and objective standards.'" Second, the petitioner points to § 27–2534.1 (b)(3) which speaks of creating a "great risk of death to more than one person." While such a phrase might be susceptible of an overly broad interpretation, the Supreme Court of Georgia has not so construed it. The only case in which the court upheld a conviction in reliance on this aggravating circumstance involved a man who stood up in a church and fired a gun indiscriminately into the audience. See

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the murder, § 27–2534.1 (b)(2); jury also found that the murder was committed for money, § 27–2534.1 (b)(4), and that a great risk of death to bystanders was created, § 27–2534.1 (b)(3)); *Floyd* v. *State*, 233 Ga. 280, 210 S. E. 2d 810 (1974) (found to have committed a capital felony—armed robbery—in the course of the murder, § 27–2534.1 (b)(2)).

[54] The petitioner also attacks § 25–2534.1 (b)(7) as vague. As we have noted in answering his overbreadth argument concerning this section, however, the state court has not given a broad reading to the scope of this provision, and there is no reason to think that juries will not be able to understand it. See n. 51, *supra*; *Proffitt* v. *Florida*, *post*, at 255–256.

*Chenault* v. *State*, 234 Ga. 216, 215 S. E. 2d 223 (1975). On the other hand, the court expressly reversed a finding of great risk when the victim was simply kidnaped in a parking lot. See *Jarrell* v. *State*, 234 Ga. 410, 424, 216 S. E. 2d 258, 269 (1975).[55]

The petitioner next argues that the requirements of *Furman* are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman*. See *supra*, at 198–199. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

The petitioner objects, finally, to the wide scope of evidence and argument allowed at presentence hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. See, *e. g.*, *Brown* v. *State*, 235 Ga. 644, 220 S. E. 2d 922 (1975). So long as the

[55] The petitioner also objects to the last part of § 27-2534.1 (b) (3) which requires that the great risk be created "by means of a weapon or device which would normally be hazardous to the lives of more than one person." While the state court has not focused on this section, it seems reasonable to assume that if a great risk in fact is created, it will be likely that a weapon or device normally hazardous to more than one person will have created it.

evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision. See *supra,* at 189–190.

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Finally, the Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 27–2537 (c)(3) (Supp. 1975).[56] In per-

[56] The court is required to specify in its opinion the similar cases which it took into consideration. § 27–2537 (e) (Supp. 1975). Special provision is made for staff to enable the court to compile data relevant to its consideration of the sentence's validity. §§ 27–2537 (f)–(h) (Supp. 1975). See generally *supra,* at 166–168.

The petitioner claims that this procedure has resulted in an inadequate basis for measuring the proportionality of sentences. First, he notes that nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained are not included in the group of cases which the Supreme Court of Georgia uses for comparative purposes. The Georgia court has the authority to consider such cases, see *Ross* v. *State,* 233 Ga. 361, 365–366, 211 S. E. 2d 356, 359 (1974), and it does consider appealed murder cases where a life sentence has been imposed. We do not think that the petitioner's argument establishes that the Georgia court's review process is ineffective. The petitioner further complains about the Georgia court's current practice of using some pre-*Furman* cases in its comparative examination. This prac-

forming its sentence-review function, the Georgia court has held that "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive." *Coley* v. *State*, 231 Ga., at 834, 204 S. E. 2d, at 616. The court on another occasion stated that "we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally . . . ." *Moore* v. *State*, 233 Ga. 861, 864, 213 S. E. 2d 829, 832 (1975). See also *Jarrell* v. *State*, *supra*, at 425, 216 S. E. 2d, at 270 (standard is whether "juries generally throughout the state have imposed the death penalty"); *Smith* v. *State*, 236 Ga. 12, 24, 222 S. E. 2d 308, 318 (1976) (found "a clear pattern" of jury behavior).

It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously. In *Coley*, it held that "[t]he prior cases indicate that the past practice among juries faced with similar factual situations and like aggravating circumstances has been to impose only the sentence of life imprisonment for the offense of rape, rather than death." 231 Ga., at 835, 204 S. E. 2d, at 617. It thereupon reduced Coley's sentence from death to life imprisonment. Similarly, although armed robbery is a capital offense under Georgia law, § 26–1902 (1972), the Georgia court concluded that the death sentences imposed in this case for that crime were "unusual in that they are rarely imposed for [armed robbery]. Thus, under the test provided by statute, . . . they must be considered to be excessive or disproportionate to the penalties imposed in similar cases." 233

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tice was necessary at the inception of the new procedure in the absence of any post-*Furman* capital cases available for comparison. It is not unconstitutional.

Ga., at 127, 210 S. E. 2d, at 667. The court therefore vacated Gregg's death sentences for armed robbery and has followed a similar course in every other armed robbery death penalty case to come before it. See *Floyd* v. *State*, 233 Ga. 280, 285, 210 S. E. 2d 810, 814 (1974); *Jarrell* v. *State*, 234 Ga., at 424–425, 216 S. E. 2d, at 270. See *Dorsey* v. *State*, 236 Ga. 591, 225 S. E. 2d 418 (1976).

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

## V

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer

can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution. Accordingly, the judgment of the Georgia Supreme Court is affirmed.

*It is so ordered.*

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

In *Furman* v. *Georgia,* 408 U. S. 238 (1972), this Court held the death penalty as then administered in Georgia to be unconstitutional. That same year the Georgia Legislature enacted a new statutory scheme under which the death penalty may be imposed for several offenses, including murder. The issue in this case is whether the death penalty imposed for murder on petitioner Gregg under the new Georgia statutory scheme may constitutionally be carried out. I agree that it may.

I

Under the new Georgia statutory scheme a person convicted of murder may receive a sentence either of death or of life imprisonment. Ga. Code Ann. § 26–1101 (1972).[1] Under Georgia Code Ann. § 26–3102 (Supp.

[1] Section 26–1101 provides as follows:

"Murder.

"(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death

1975), the sentence will be life imprisonment unless the jury at a separate evidentiary proceeding immediately following the verdict finds unanimously and beyond a reasonable doubt at least one statutorily defined "aggravating circumstance." [2] The aggravating circumstances are:

"(1) The offense of murder, rape, armed robbery,

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of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life."

The death penalty may also be imposed for kidnaping, Ga. Code Ann. § 26–1311; armed robbery, § 26–1902; rape, § 26–2001; treason, § 26–2201; and aircraft hijacking, § 26–3301.

[2] Section 26–3102 (Supp. 1975) provides:

"Capital offenses; jury verdict and sentence.

"Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the

or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person

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case is tried without a jury or when the judge accepts a plea of guilty."

Georgia Laws, 1973, Act No. 74, p. 162, provides:

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal be-

who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

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cause of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." § 27–2534.1 (b) (Supp. 1975).

Having found an aggravating circumstance, however, the jury is not required to impose the death penalty. Instead, it is merely authorized to impose it after considering evidence of "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the [enumerated] statutory aggravating circumstances . . . ." § 27–2534.1 (b) (Supp. 1975). Unless the jury unanimously determines that the death penalty should be imposed, the defendant will be sentenced to life imprisonment. In the event that the jury does impose the death penalty, it must designate in writing the aggravating circumstance which it found to exist beyond a reasonable doubt.

An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed. To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. § 27–2537 (a) (Supp. 1975). The questionnaire contains, *inter alia*, six questions designed to disclose whether race played a role in the case and one question asking the trial judge whether the evidence forecloses "all doubt respecting the defend-

ant's guilt." In deciding whether the death penalty is to be sustained in any given case, the court shall determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> "(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27–2534.1 (b), and
>
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. . . ."

In order that information regarding "similar cases" may be before the court, the post of Assistant to the Supreme Court was created. The Assistant must "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate." § 27–2537 (f).[3] The court is required to include in its decision a reference to "those similar cases which it took into consideration." § 27–2537 (e).

## II

Petitioner Troy Gregg and a 16-year-old companion, Floyd Allen, were hitchhiking from Florida to Asheville, N. C., on November 21, 1973. They were picked up in an automobile driven by Fred Simmons and Bob Moore, both of whom were drunk. The car broke down and Simmons purchased a new one—a 1960 Pontiac—using

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[3] Section 27–2537 (g) provides:

"The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence. . . ."

part of a large roll of cash which he had with him. After picking up another hitchhiker in Florida and dropping him off in Atlanta, the car proceeded north to Gwinnett County, Ga., where it stopped so that Moore and Simmons could urinate. While they were out of the car Simmons was shot in the eye and Moore was shot in the right cheek and in the back of the head. Both died as a result.

On November 24, 1973, at 3 p. m., on the basis of information supplied by the hitchhiker, petitioner and Allen were arrested in Asheville, N. C. They were then in possession of the car which Simmons had purchased; petitioner was in possession of the gun which had killed Simmons and Moore and $107 which had been taken from them; and in the motel room in which petitioner was staying was a new stereo and a car stereo player.

At about 11 p. m., after the Gwinnett County police had arrived, petitioner made a statement to them admitting that he had killed Moore and Simmons, but asserting that he had killed them in self-defense and in defense of Allen. He also admitted robbing them of $400 and taking their car. A few moments later petitioner was asked why he had shot Moore and Simmons and responded: "By God, I wanted them dead."

At about 1 o'clock the next morning, petitioner and Allen were released to the custody of the Gwinnett County police and were transported in two cars back to Gwinnett County. On the way, at about 5 a. m., the car stopped at the place where Moore and Simmons had been killed. Everyone got out of the car. Allen was asked, in petitioner's presence, how the killing occurred. He said that he had been sitting in the back seat of the 1960 Pontiac and was about half asleep. He woke up when the car stopped. Simmons and Moore got out, and as soon as they did petitioner turned around and told Allen: "Get out, we're going to rob them." Allen said that he

got out and walked toward the back of the car, looked around and could see petitioner, with a gun in his hand, leaning up against the car so he could get a good aim. Simmons and Moore had gone down the bank and had relieved themselves and as they were coming up the bank petitioner fired three shots. One of the men fell, the other staggered. Petitioner then circled around the back and approached the two men, both of whom were now lying in the ditch, from behind. He placed the gun to the head of one of them and pulled the trigger. Then he went quickly to the other one and placed the gun to his head and pulled the trigger again. He then took the money, whatever was in their pockets. He told Allen to get in the car and they drove away.

When Allen had finished telling this story, one of the officers asked petitioner if this was the way it had happened. Petitioner hung his head and said that it was. The officer then said: "You mean you shot these men down in cold blooded murder just to rob them," and petitioner said yes. The officer then asked him why and petitioner said he did not know. Petitioner was indicted in two counts for murder and in two counts for robbery.

At trial, petitioner's defense was that he had killed in self-defense. He testified in his own behalf and told a version of the events similar to that which he had originally told to the Gwinnett County police. On cross-examination, he was confronted with a letter to Allen recounting a version of the events similar to that to which he had just testified and instructing Allen to memorize and burn the letter. Petitioner conceded writing the version of the events, but denied writing the portion of the letter which instructed Allen to memorize and burn it. In rebuttal, the State called a handwriting expert who testified that the entire letter was written by the same person.

The jury was instructed on the elements of murder [4] and robbery. The trial judge gave an instruction on self-defense, but refused to submit the lesser included

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[4] The court said:

"And, I charge you that our law provides, in connection with the offense of murder the following. A person commits murder when he unlawfully and with malice aforethought, either express or implied causes the death of another human being.

"Express malice is that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances, capable of proof.

"Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart.

"Section B of this Code Section, our law provides that a person also commits the crime of murder when in the commission of a felony he causes the death of another human being irrespective of malice.

"Now, then, I charge you that if you find and believe beyond a reasonable doubt that the defendant did commit the homicide in the two counts alleged in this indictment, at the time he was engaged in the commission of some other felony, you would be authorized to find him guilty of murder.

"In this connection, I charge you that in order for a homicide to have been done in the perpetration of a felony, there must be some connection between the felony and the homicide. The homicide must have been done in pursuance of the unlawful act not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed, there must be such a legal relationship between the homicide and the felony that you find that the homicide occurred by reason of and a part of the felony or that it occurred before the felony was at an end, so that the felony had a legal relationship to the homicide and was concurrent with it in part at least, and a part of it in an actual and material sense. A homicide is committed in the perpetration of a felony when it is committed by the accused while he is engaged in the performance of any act required for the full execution of such felony.

"I charge you that if you find and believe beyond a reasonable doubt that the homicide alleged in this indictment was caused by

offense of manslaughter to the jury. It returned verdicts of guilty on all counts.

No new evidence was presented at the sentencing proceeding. However, the prosecutor and the attorney for petitioner each made arguments to the jury on the issue of punishment. The prosecutor emphasized the strength of the case against petitioner and the fact that he had murdered in order to eliminate the witnesses to the robbery. The defense attorney emphasized the possibility that a mistake had been made and that petitioner was not guilty. The trial judge instructed the jury on

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the defendant while he, the said accused was in the commission of a felony as I have just given you in this charge, you would be authorized to convict the defendant of murder.

"And this you would be authorized to do whether the defendant intended to kill the deceased or not. A homicide, although unintended, if committed by the accused at the time he is engaged in the commission of some other felony constitutes murder.

"In order for a killing to have been done in perpetration or attempted perpetration of a felony, or of a particular felony, there must be some connection as I previously charged you between the felony and the homicide.

"Before you would be authorized to find the defendant guilty of the offense of murder, you must find and believe beyond a reasonable doubt, that the defendant did, with malice aforethought either express or implied cause the deaths of [Simmons or Moore] or you must find and believe beyond a reasonable doubt that the defendant, while in the commission of a felony caused the death of these two victims just named.

"I charge you, that if you find and believe that, at any time prior to the date this indictment was returned into this court that the defendant did, in the county of Gwinnett, State of Georgia, with malice aforethought kill and murder the two men just named in the way and manner set forth in the indictment or that the defendant caused the deaths of these two men in the way and manner set forth in the indictment, while he, the said accused was in the commission of a felony, then in either event, you would be authorized to find the defendant guilty of murder."

their sentencing function and in so doing submitted to them three statutory aggravating circumstances. He stated:

> "Now, as to counts one and three, wherein the defendant is charged with the murders of—has been found guilty of the murders of [Simmons and Moore], the following aggravating circumstances are some that you can consider, as I say, you must find that these existed beyond a reasonable doubt before the death penalty can be imposed.
>
> "One—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].
>
> "Two—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> "Three—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of mind of the defendant.
>
> "Now, so far as the counts two and four, that is the counts of armed robbery, of which you have found the defendant guilty, then you may find—inquire into these aggravating circumstances.
>
> "That the offense of armed robbery was committed while the offender was engaged in the commission of two capital felonies, to-wit the murders of [Simmons and Moore] or that the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in the indictment, or three, that the offense of armed robbery was outrageously and wantonly vile, horrible and inhuman in that they involved the depravity of the mind of the defendant.

> "Now, if you find that there was one or more of these aggravating circumstances existed beyond a reasonable doubt, then and I refer to each individual count, then you would be authorized to consider imposing the sentence of death.
>
> "If you do not find that one of these aggravating circumstances existed beyond a reasonable doubt, in either of these counts, then you would not be authorized to consider the penalty of death. In that event, the sentence as to counts one and three, those are the counts wherein the defendant was found guilty of murder, the sentence could be imprisonment for life." Tr. 476–477.

The jury returned the death penalty on all four counts finding all the aggravating circumstances submitted to it, except that it did not find the crimes to have been "outrageously or wantonly vile," etc.

On appeal the Georgia Supreme Court affirmed the death sentences on the murder counts and vacated the death sentences on the robbery counts. 233 Ga. 117, 210 S. E. 2d 659 (1974). It concluded that the murder sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supported the finding of a statutory aggravating factor with respect to the murders; and, citing several cases in which the death penalty had been imposed previously for murders of persons who had witnessed a robbery, held:

> "After considering both the crimes and the defendant and after comparing the evidence and the sentences in this case with those of previous murder cases, we are also of the opinion that these two sentences of death are not excessive or disproportionate to the penalties imposed in similar cases

which are hereto attached." [5] *Id.*, at 127, 210 S. E. 2d, at 667.

However, it held with respect to the robbery sentences:

"Although there is no indication that these two

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[5] In a subsequently decided robbery-murder case, the Georgia Supreme Court had the following to say about the same "similar cases" referred to in this case:

"We have compared the evidence and sentence in this case with other similar cases and conclude the sentence of death is not excessive or disproportionate to the penalty imposed in those cases. Those similar cases we considered in reviewing the case are: *Lingo v. State*, 226 Ga. 496 (175 SE2d 657), *Johnson v. State*, 226 Ga. 511 (175 SE2d 840), *Pass v. State*, 227 Ga. 730 (182 SE2d 779), *Watson v. State*, 229 Ga. 787 (194 SE2d 407), *Scott v. State*, 230 Ga. 413 (197 SE2d 338), *Kramer v. State*, 230 Ga. 855 (199 SE2d 805), and *Gregg v. State*, 233 Ga. 117 (210 SE2d 659).

"In each of the comparison cases cited, the records show that the accused was found guilty of murder of the victim of the robbery or burglary committed in the course of such robbery or burglary. In each of those cases, the jury imposed the sentence of death. In *Pass v. State*, supra, the murder took place in the victim's home, as occurred in the case under consideration.

"We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27-2537 (c) (3). Notwithstanding the fact that there have been cases in which robbery victims were murdered and the juries imposed life sentences (see Appendix), the cited cases show that juries faced with similar factual situations have imposed death sentences. Compare *Coley v. State*, 231 Ga. 829, 835, supra. Thus the sentence here was not 'wantonly and freakishly imposed' (see above)." *Moore* v. *State*, 233 Ga. 861, 865-866, 213 S. E. 2d 829, 833 (1975).

In another case decided after the instant case the Georgia Supreme Court stated:

"The cases reviewed included all murder cases coming to this court since January 1, 1970. All kidnapping cases were likewise reviewed. The comparison involved a search for similarities in addition to the similarity of offense charged and sentence imposed.

"All of the murder cases selected for comparison involved mur-

> sentences were imposed under the influence of passion, prejudice or any other arbitrary factor, the sentences imposed here are unusual in that they are rarely imposed for this offense. Thus, under the test provided by statute for comparison (Code Ann. § 27–2537 (c), (3)), they must be considered to be excessive or disproportionate to the penalties imposed in similar cases." *Ibid.*

Accordingly, the sentences on the robbery counts were vacated.

III

The threshold question in this case is whether the death penalty may be carried out for murder under the Georgia legislative scheme consistent with the decision in *Furman* v. *Georgia, supra.* In *Furman,* this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discrimina-

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ders wherein all of the witnesses were killed or an attempt was made to kill all of the witnesses, and kidnapping cases where the victim was killed or seriously injured.

"The cases indicate that, except in some special circumstance such as a juvenile or an accomplice driver of a get-away vehicle, where the murder was committed and trial held at a time when the death penalty statute was effective, juries generally throughout the state have imposed the death penalty. The death penalty has also been imposed when the kidnap victim has been mistreated or seriously injured. In this case the victim was murdered.

"The cold blooded and callous nature of the offenses in this case are the types condemned by death in other cases. This defendant's death sentences for murder and kidnapping are not excessive or disproportionate to the penalty imposed in similar cases. Using the standards prescribed for our review by the statute, we conclude that the sentences of death imposed in this case for murder and kidnapping were not imposed under the influence of passion, prejudice or any other arbitrary factor." *Jarrell* v. *State,* 234 Ga. 410, 425–426, 216 S. E. 2d 258, 270 (1975).

torily,[6] wantonly and freakishly,[7] and so infrequently[8] that any given death sentence was cruel and unusual. Petitioner argues that, as in *Furman*, the jury is still the sentencer; that the statutory criteria to be considered by the jury on the issue of sentence under Georgia's new statutory scheme are vague and do not purport to be all-inclusive; and that, in any event, there are *no* circumstances under which the jury is required to impose the death penalty.[9] Consequently, the petitioner argues that the death penalty will inexorably be imposed in as discriminatory, standardless, and rare a manner as it was imposed under the scheme declared invalid in *Furman*.

The argument is considerably overstated. The Georgia Legislature has made an effort to identify those aggravating factors which it considers necessary and relevant to the question whether a defendant convicted of capital murder should be sentenced to death.[10] The

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[6] See *Furman* v. *Georgia*, 408 U. S., at 240 (Douglas, J., concurring).

[7] See *id.*, at 306 (STEWART, J., concurring).

[8] See *id.*, at 310 (WHITE, J., concurring).

[9] Petitioner also argues that the differences between murder—for which the death penalty may be imposed—and manslaughter—for which it may not be imposed—are so difficult to define and the jury's ability to disobey the trial judge's instructions so unfettered that juries will use the guilt-determination phase of a trial arbitrarily to convict some of a capital offense while convicting similarly situated individuals only of noncapital offenses. I believe this argument is enormously overstated. However, since the jury has discretion not to impose the death penalty at the sentencing phase of a case in Georgia, the problem of offense definition and jury nullification loses virtually all its significance in this case.

[10] The factor relevant to this case is that the "murder . . . was committed while the offender was engaged in the commission of another capital felony." The State in its brief refers to this type of murder as "witness-elimination" murder. Apparently the State of Georgia wishes to supply a substantial incentive to those engaged

jury which imposes sentence is instructed on all statutory aggravating factors which are supported by the evidence, and is told that it may not impose the death penalty unless it unanimously finds at least one of those factors to have been established beyond a reasonable doubt. The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. There is, therefore, reason to expect that Georgia's current system would escape the infirmities which invalidated its previous system under *Furman*. However, the Georgia Legislature was not satisfied with a system which might, but also might not, turn out in practice to result in death sentences being imposed with reasonable consistency for certain serious murders. Instead, it gave the Georgia Supreme Court the power and the obligation to perform precisely the task which three Justices of this Court, whose opinions were necessary to the result, performed

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in robbery to leave their guns at home and to persuade their coconspirators to do the same in the hope that fewer victims of robberies will be killed.

in *Furman:* namely, the task of deciding whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion.

In considering any given death sentence on appeal, the Georgia Supreme Court is to determine whether the sentence imposed was consistent with the relevant statutes—*i. e.,* whether there was sufficient evidence to support the finding of an aggravating circumstance. Ga. Code Ann. § 27–2537 (c)(2) (Supp. 1975). However, it must do much more than determine whether the penalty was lawfully imposed. It must go on to decide—after reviewing the penalties imposed in "similar cases"—whether the penalty is "excessive or disproportionate" considering both the crime and the defendant. § 27–2537 (c)(3) (Supp. 1975). The new Assistant to the Supreme Court is to assist the court in collecting the records of "all capital felony cases" [11] in the State of Georgia in which sentence was imposed after January 1, 1970. § 27–2537 (f) (Supp. 1975). The court also has the obligation of determining whether the penalty was "imposed under the influence of passion, prejudice, or any other arbitrary factor." § 27–2537 (c)(1) (Supp. 1975). The Georgia Supreme Court has interpreted the appellate review statute to require it to set aside the death sentence whenever juries across the State impose it only rarely for the type of crime in question; but to require it to affirm death sentences whenever juries across the State generally impose it for the crime in question.

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[11] Petitioner states several times without citation that the only cases considered by the Georgia Supreme Court are those in which an appeal was taken either from a sentence of death or life imprisonment. This view finds no support in the language of the relevant statutes. *Moore* v. *State,* 233 Ga., at 863–864, 213 S. E. 2d, at 832.

Thus, in this case the Georgia Supreme Court concluded that the death penalty was so rarely imposed for the crime of robbery that it set aside the sentences on the robbery counts, and effectively foreclosed that penalty from being imposed for that crime in the future under the legislative scheme now in existence. Similarly, the Georgia Supreme Court has determined that juries impose the death sentence too rarely with respect to certain classes of rape. Compare *Coley* v. *State*, 231 Ga. 829, 204 S. E. 2d 612 (1974), with *Coker* v. *State*, 234 Ga. 555, 216 S. E. 2d 782 (1975). However, it concluded that juries "generally throughout the state" have imposed the death penalty for those who murder witnesses to armed robberies. *Jarrell* v. *State*, 234 Ga. 410, 425, 216 S. E. 2d 258, 270 (1975). Consequently, it affirmed the sentences in this case on the murder counts. If the Georgia Supreme Court is correct with respect to this factual judgment, imposition of the death penalty in this and similar cases is consistent with *Furman*. Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish, and has not even attempted to establish, that the Georgia Supreme Court failed properly to perform its task in this case or that it is incapable of performing its task adequately in all cases; and this Court should not assume that it did not do so.

Petitioner also argues that decisions made by the prosecutor—either in negotiating a plea to some lesser offense than capital murder or in simply declining to charge capital murder—are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*. I address this

point separately because the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.

Petitioner's argument that there is an unconstitutional

amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

IV

For the reasons stated in dissent in *Roberts* v. *Louisiana*, *post*, at 350–356, neither can I agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment.

I therefore concur in the judgment of affirmance.

Statement of THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST:

We concur in the judgment and join the opinion of MR. JUSTICE WHITE, agreeing with its analysis that Georgia's system of capital punishment comports with

the Court's holding in *Furman* v. *Georgia*, 408 U. S. 238 (1972).

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. See *Furman* v. *Georgia*, 408 U. S. 238, 405–414 (1972) (BLACKMUN, J., dissenting), and *id.*, at 375 (BURGER, C. J., dissenting); *id.*, at 414 POWELL, J., dissenting); *id.*, at 465 (REHNQUIST, J., dissenting).

MR. JUSTICE BRENNAN, dissenting.*

The Cruel and Unusual Punishments Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [1] The opinions of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS today hold that "evolving standards of decency" require focus not on the essence of the death penalty itself but primarily upon the procedures employed by the State to single out persons to suffer the penalty of death. Those opinions hold further that, so viewed, the Clause invalidates the mandatory infliction of the death penalty but not its infliction under sentencing procedures that MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS conclude adequately safeguard against the risk that the death penalty was imposed in an arbitrary and capricious manner.

In *Furman* v. *Georgia*, 408 U. S. 238, 257 (1972) (concurring opinion), I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself and not primarily or solely upon the procedures

*[This opinion applies also to No. 75–5706, *Proffitt* v. *Florida*, *post*, p. 242, and No. 75–5394, *Jurek* v. *Texas*, *post*, p. 262.]

[1] *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion of Warren, C. J.).

under which the determination to inflict the penalty upon a particular person was made. I there said:

> "From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.' It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime." *Id.*, at 296.[2]

That continues to be my view. For the Clause forbidding cruel and unusual punishments under our con-

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[2] Quoting T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute 15 (1959).

stitutional system of government embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws. Thus, I too say: "For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts, or, as stated by the Supreme Court . . . the application of 'evolving standards of decency' . . . ." [3]

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.[4] My opinion in *Furman* v. *Georgia* concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion. I emphasize only that foremost among the "moral concepts" recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity. A judicial determina-

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[3] *Novak* v. *Beto*, 453 F. 2d 661, 672 (CA5 1971) (Tuttle, J., concurring in part and dissenting in part).

[4] Tao, Beyond *Furman v. Georgia:* The Need for a Morally Based Decision on Capital Punishment, 51 Notre Dame Law. 722, 736 (1976).

tion whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause. 408 U. S., at 270.

I do not understand that the Court disagrees that "[i]n comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." *Id.*, at 291. For three of my Brethren hold today that mandatory infliction of the death penalty constitutes the penalty cruel and unusual punishment. I perceive no principled basis for this limitation. Death for whatever crime and under all circumstances "is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.'" *Id.*, at 290. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. *Id.*, at 279.

The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity." *Id.*, at 273. As such it is a penalty that "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]."[5] I therefore would hold,

[5] *Trop* v. *Dulles*, 356 U. S., at 99 (plurality opinion of Warren, C. J.).

on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first." [6]

I dissent from the judgments in No. 74–6257, *Gregg* v. *Georgia*, No. 75–5706, *Proffitt* v. *Florida*, and No. 75–5394, *Jurek* v. *Texas*, insofar as each upholds the death sentences challenged in those cases. I would set aside the death sentences imposed in those cases as violative of the Eighth and Fourteenth Amendments.

MR. JUSTICE MARSHALL, dissenting.*

In *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (concurring opinion), I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view.

I have no intention of retracing the "long and tedious journey," *id.*, at 370, that led to my conclusion in *Furman*. My sole purposes here are to consider the suggestion that my conclusion in *Furman* has been undercut by developments since then, and briefly to evaluate the basis for my Brethren's holding that the extinction of life is a permissible form of punishment under the Cruel and Unusual Punishments Clause.

In *Furman* I concluded that the death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive. *Id.*, at 331–332; 342–359. And

[6] A. Camus, Reflections on the Guillotine 5–6 (Fridtjof-Karla Pub. 1960).

*[This opinion applies also to No. 75–5706, *Proffitt* v. *Florida*, *post*, p. 242, and No. 75–5394, *Jurek* v. *Texas*, *post*, p. 262.]

second, the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable. *Id.*, at 360–369.

Since the decision in *Furman*, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death. 49 U. S. C. §§ 1472 (i), (n) (1970 ed., Supp. IV). I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people. But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed* citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable. 408 U. S., at 360–369. A recent study, conducted after the enactment of the post-*Furman* statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.[1]

Even assuming, however, that the post-*Furman* enactment of statutes authorizing the death penalty renders the prediction of the views of an informed citizenry an

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[1] Sarat & Vidmar, Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 Wis. L. Rev. 171.

uncertain basis for a constitutional decision, the enactment of those statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive. An excessive penalty is invalid under the Cruel and Unusual Punishments Clause "even though popular sentiment may favor" it. *Id.*, at 331; *ante*, at 173, 182–183 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Roberts* v. *Louisiana*, *post*, at 353–354 (WHITE, J., dissenting). The inquiry here, then, is simply whether the death penalty is necessary to accomplish the legitimate legislative purposes in punishment, or whether a less severe penalty—life imprisonment—would do as well. *Furman*, *supra*, at 342 (MARSHALL, J., concurring).

The two purposes that sustain the death penalty as nonexcessive in the Court's view are general deterrence and retribution. In *Furman*, I canvassed the relevant data on the deterrent effect of capital punishment. 408 U. S., at 347–354.[2] The state of knowledge at that point, after literally centuries of debate, was summarized as follows by a United Nations Committee:

> "It is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." [3]

The available evidence, I concluded in *Furman*, was convincing that "capital punishment is not necessary as a deterrent to crime in our society." *Id.*, at 353.

The Solicitor General in his *amicus* brief in these cases

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[2] See *e. g.*, T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (1959).

[3] United Nations, Department of Economic and Social Affairs, Capital Punishment, pt. II, ¶ 159, p. 123 (1968).

relies heavily on a study by Isaac Ehrlich,[4] reported a year after *Furman*, to support the contention that the death penalty does deter murder. Since the Ehrlich study was not available at the time of *Furman* and since it is the first scientific study to suggest that the death penalty may have a deterrent effect, I will briefly consider its import.

The Ehrlich study focused on the relationship in the Nation as a whole between the homicide rate and "execution risk"—the fraction of persons convicted of murder who were actually executed. Comparing the differences in homicide rate and execution risk for the years 1933 to 1969, Ehrlich found that increases in execution risk were associated with increases in the homicide rate.[5] But when he employed the statistical technique of multiple regression analysis to control for the influence of other variables posited to have an impact on the homicide rate,[6] Ehrlich found a negative correlation between changes in the homicide rate and changes in execution risk. His tentative conclusion was that for the period from 1933 to 1967 each additional execution in the United States might have saved eight lives.[7]

The methods and conclusions of the Ehrlich study

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[4] I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death (Working Paper No. 18, National Bureau of Economic Research, Nov. 1973); Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975).

[5] *Id.*, at 409.

[6] The variables other than execution risk included probability of arrest, probability of conviction given arrest, national aggregate measures of the percentage of the population between age 14 and 24, the unemployment rate, the labor force participation rate, and estimated per capita income.

[7] *Id.*, at 398, 414.

have been severely criticized on a number of grounds.[8] It has been suggested, for example, that the study is defective because it compares execution and homicide rates on a nationwide, rather than a state-by-state, basis. The aggregation of data from all States—including those that have abolished the death penalty—obscures the relationship between murder and execution rates. Under Ehrlich's methodology, a decrease in the execution risk in one State combined with an increase in the murder rate in another State would, all other things being equal, suggest a deterrent effect that quite obviously would not exist. Indeed, a deterrent effect would be suggested if, once again all other things being equal, one State abolished the death penalty and experienced no change in the murder rate, while another State experienced an increase in the murder rate.[9]

The most compelling criticism of the Ehrlich study is

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[8] See Passell & Taylor, The Deterrent Effect of Capital Punishment: Another View (unpublished Columbia University Discussion Paper 74–7509, Mar. 1975), reproduced in Brief for Petitioner App. E in *Jurek* v. *Texas*, O. T. 1975, No. 75–5844; Passell, The Deterrent Effect of the Death Penalty: A Statistical Test, 28 Stan. L. Rev. 61 (1975); Baldus & Cole, A Comparison of the Work of Thorsten Sellin & Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 170 (1975); Bowers & Pierce, The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment, 85 Yale L. J. 187 (1975); Peck, The Deterrent Effect of Capital Punishment: Ehrlich and His Critics, 85 Yale L. J. 359 (1976). See also Ehrlich, Deterrence: Evidence and Inference, 85 Yale L. J. 209 (1975); Ehrlich, Rejoinder, 85 Yale L. J. 368 (1976). In addition to the items discussed in text, criticism has been directed at the quality of Ehrlich's data, his choice of explanatory variables, his failure to account for the interdependence of those variables, and his assumptions as to the mathematical form of the relationship between the homicide rate and the explanatory variables.

[9] See Baldus & Cole, *supra*, at 175–177.

that its conclusions are extremely sensitive to the choice of the time period included in the regression analysis. Analysis of Ehrlich's data reveals that all empirical support for the deterrent effect of capital punishment disappears when the five most recent years are removed from his time series—that is to say, whether a decrease in the execution risk corresponds to an increase or a decrease in the murder rate depends on the ending point of the sample period.[10] This finding has cast severe doubts on the reliability of Ehrlich's tentative conclusions.[11] Indeed, a recent regression study, based on Ehrlich's theoretical model but using cross-section state data for the years 1950 and 1960, found no support for the conclusion that executions act as a deterrent.[12]

The Ehrlich study, in short, is of little, if any, assistance in assessing the deterrent impact of the death penalty. Accord, *Commonwealth* v. *O'Neal*, —— Mass. ——, ——, 339 N. E. 2d 676, 684 (1975). The evidence I reviewed in *Furman* [13] remains convincing, in my view, that "capital punishment is not necessary as a deterrent to crime in our society." 408 U. S., at 353. The justification for the death penalty must be found elsewhere.

The other principal purpose said to be served by the death penalty is retribution.[14] The notion that retribu-

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[10] Bowers & Pierce, *supra*, n. 8, at 197–198. See also Passell & Taylor, *supra*, n. 8, at 2–66—2–68.

[11] See Bowers & Pierce, *supra*, n. 8, at 197–198; Baldus & Cole, *supra*, n. 8, at 181, 183–185; Peck, *supra*, n. 8, at 366–367.

[12] Passell, *supra*, n. 8.

[13] See also Bailey, Murder and Capital Punishment: Some Further Evidence, 45 Am. J. Orthopsychiatry 669 (1975); W. Bowers, Executions in America 121–163 (1974).

[14] In *Furman*, I considered several additional purposes arguably served by the death penalty. 408 U. S., at 314, 342, 355–358. The only additional purpose mentioned in the opinions in these cases is specific deterrence—preventing the murderer from com-

tion can serve as a moral justification for the sanction of death finds credence in the opinion of my Brothers STEWART, POWELL, and STEVENS, and that of my Brother WHITE in *Roberts* v. *Louisiana*, *post*, p. 337. See also *Furman* v. *Georgia*, 408 U. S., at 394–395 (BURGER, C. J., dissenting). It is this notion that I find to be the most disturbing aspect of today's unfortunate decisions.

The concept of retribution is a multifaceted one, and any discussion of its role in the criminal law must be undertaken with caution. On one level, it can be said that the notion of retribution or reprobation is the basis of our insistence that only those who have broken the law be punished, and in this sense the notion is quite obviously central to a just system of criminal sanctions. But our recognition that retribution plays a crucial role in determining who may be punished by no means requires approval of retribution as a general justification for punishment.[15] It is the question whether retribution can provide a moral justification for punishment—in particular, capital punishment—that we must consider.

My Brothers STEWART, POWELL, and STEVENS offer the following explanation of the retributive justification for capital punishment:

> " 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed

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mitting another crime. Surely life imprisonment and, if necessary, solitary confinement would fully accomplish this purpose. Accord, *Commonwealth* v. *O'Neal*, — Mass. —, —, 339 N. E. 2d 676, 685 (1975); *People* v. *Anderson*, 6 Cal. 3d 628, 651, 493 P. 2d 880, 896, cert. denied, 406 U. S. 958 (1972).

[15] See, *e. g.*, H. Hart, Punishment and Responsibility 8–10, 71–83 (1968); H. Packer, Limits of the Criminal Sanction 38–39, 66 (1968).

> by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.'" *Ante*, at 183, quoting from *Furman* v. *Georgia*, *supra*, at 308 (STEWART, J., concurring).

This statement is wholly inadequate to justify the death penalty. As my Brother BRENNAN stated in *Furman*, "[t]here is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders." 408 U. S., at 303 (concurring opinion).[16] It simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands.

In a related vein, it may be suggested that the expression of moral outrage through the imposition of the death penalty serves to reinforce basic moral values—that it marks some crimes as particularly offensive and therefore to be avoided. The argument is akin to a deterrence argument, but differs in that it contemplates the individual's shrinking from antisocial conduct, not because he fears punishment, but because he has been told in the strongest possible way that the conduct is wrong. This contention, like the previous one, provides no support for the death penalty. It is inconceivable that any individual concerned about conforming his conduct to what society says is "right" would fail to realize that murder is "wrong" if the penalty were simply life imprisonment.

The foregoing contentions—that society's expression of moral outrage through the imposition of the death penalty pre-empts the citizenry from taking the law into its

[16] See *Commonwealth* v. *O'Neal*, *supra*, at —, 339 N. E. 2d, at 687; Bowers, *supra*, n. 13, at 135; Sellin, *supra*, n. 2, at 79.

own hands and reinforces moral values—are not retributive in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results.

There remains for consideration, however, what might be termed the purely retributive justification for the death penalty—that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer's life is itself morally good.[17] Some of the language of the opinion of my Brothers STEWART, POWELL, and STEVENS in No. 74–6257 appears positively to embrace this notion of retribution for its own sake as a justification for capital punishment.[18] They state:

> "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Ante*, at 184 (footnote omitted).

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[17] See Hart, *supra*, n. 15, at 72, 74–75, 234–235; Packer, *supra*, n. 15, at 37–39.

[18] MR. JUSTICE WHITE's view of retribution as a justification for the death penalty is not altogether clear. "The widespread reenactment of the death penalty," he states at one point, "answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution." *Roberts* v. *Louisiana*, *post*, at 354. (WHITE, J., dissenting). But MR. JUSTICE WHITE later states: "It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons." *Post*, at 355.

They then quote with approval from Lord Justice Denning's remarks before the British Royal Commission on Capital Punishment:

> " 'The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.' " *Ante*, at 184 n. 30.

Of course, it may be that these statements are intended as no more than observations as to the popular demands that it is thought must be responded to in order to prevent anarchy. But the implication of the statements appears to me to be quite different—namely, that society's judgment that the murderer "deserves" death must be respected not simply because the preservation of order requires it, but because it is appropriate that society make the judgment and carry it out. It is this latter notion, in particular, that I consider to be fundamentally at odds with the Eighth Amendment. See *Furman* v. *Georgia*, 408 U. S., at 343–345 (MARSHALL, J., concurring). The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty, for as JUSTICES STEWART, POWELL, and STEVENS remind us, "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society." *Ante*, at 182. To be sustained under the Eighth Amendment, the death penalty must "compor[t] with the basic concept of human dignity at the core of the Amendment," *ibid.*; the objective in imposing it must be "[consistent] with our respect for the dignity of [other] men." *Ante*, at 183. See *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion). Under these standards, the taking of life "because the wrongdoer deserves it" surely must

fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth.[19]

The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments. I respectfully dissent from the Court's judgment upholding the sentences of death imposed upon the petitioners in these cases.

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[19] See *Commonwealth* v. *O'Neal, supra,* at —, 339 N. E. 2d, at 687; *People* v. *Anderson,* 6 Cal. 3d, at 651, 493 P. 2d, at 896.

# PROFFITT *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 75-5706. Argued March 31, 1976—Decided July 2, 1976

Petitioner, whose first-degree murder conviction and death sentence were affirmed by the Florida Supreme Court, attacks the constitutionality of the Florida capital-sentencing procedure, that was enacted in response to *Furman* v. *Georgia*, 408 U. S. 238. Under the new statute, the trial judge (who is the sentencing authority) must weigh eight statutory aggravating factors against seven statutory mitigating factors to determine whether the death penalty should be imposed, thus requiring him to focus on the circumstances of the crime and the character of the individual defendant. The Florida system resembles the Georgia system upheld in *Gregg* v. *Georgia*, *ante*, p. 153, except for the basic difference that in Florida the sentence is determined by the trial judge rather than by the jury, which has an advisory role with respect to the sentencing phase of the trial. *Held:* The judgment is affirmed. Pp. 251–260; 260–261; 261.

315 So. 2d 461, affirmed.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, concluded that:

1. The imposition of the death penalty is not *per se* cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Gregg*, *ante*, at 168–187. P. 247.

2. On its face, the Florida procedures for imposition of the death penalty satisfy the constitutional deficiencies identified in *Furman*, *supra*. Florida trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life, and their decisions are reviewed to ensure that they comport with other sentences imposed under similar circumstances. Petitioner's contentions that the new Florida procedures remain arbitrary and capricious lack merit. Pp. 251–259.

(a) The argument that the Florida system is constitutionally invalid because it allows discretion to be exercised at each stage of the criminal proceeding fundamentally misinterprets *Furman*. *Gregg*, *ante*, at 199. P. 254.

(b) The aggravating circumstances authorizing the death penalty if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons," as construed by the Florida Supreme Court, provide adequate guidance to those involved in the sentencing process and as thus construed are not overly broad. Pp. 255–256.

(c) Petitioner's argument that the imprecision of the mitigating circumstances makes them incapable of determination by a judge or jury and other contentions in a similar vein raise questions about line-drawing evaluations that do not differ from factors that juries and judges traditionally consider. The Florida statute gives clear and precise directions to judge and jury to enable them to weigh aggravating circumstances against mitigating ones. Pp. 257–258.

(d) Contrary to petitioner's contention, the State Supreme Court's review role is neither ineffective nor arbitrary, as evidenced by the careful procedures it has followed in assessing the imposition of death sentences, over a third of which that court has vacated. Pp. 258–259.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, concluded that under the Florida law the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors, and as to those categories the penalty will not be freakishly or rarely, but will be regularly, imposed; and therefore the Florida scheme does not run afoul of the Court's holding in *Furman*. Petitioner's contentions about prosecutorial discretion and his argument that the death penalty may never be imposed under any circumstances consistent with the Eighth Amendment are without substance. See *Gregg* v. *Georgia, ante,* at 224–225 (WHITE, J., concurring in judgment) and *Roberts* v. *Louisiana, post,* at 348–350; 350–356 (WHITE, J., dissenting). Pp. 260–261.

MR. JUSTICE BLACKMUN concurred in the judgment. See *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (BLACKMUN, J., dissenting), and *id.,* at 375, 414, and 465. P. 261.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by POWELL, J. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 260. BLACKMUN, J., filed a state-

ment concurring in the judgment, *post*, p. 261. BRENNAN, J., *ante*, p. 227, and MARSHALL, J., *ante*, p. 231, filed dissenting opinions.

*Clinton A. Curtis* argued the cause for petitioner. With him on the brief was *Jack O. Johnson.*

*Robert L. Shevin,* Attorney General of Florida, argued the cause for respondent. With him on the brief were *A. S. Johnston, George R. Georgieff,* and *Raymond L. Marky,* Assistant Attorneys General.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae.* With him on the brief was *Deputy Solicitor General Randolph. William E. James,* Assistant Attorney General, argued the cause for the State of California as *amicus curiae.* With him on the brief were *Evelle J. Younger,* Attorney General, and *Jack R. Winkler,* Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE POWELL.

The issue presented by this case is whether the imposition of the sentence of death for the crime of murder under the law of Florida violates the Eighth and Fourteenth Amendments.

I

The petitioner, Charles William Proffitt, was tried, found guilty, and sentenced to death for the first-degree

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**Jack Greenberg, James M. Nabrit III, Peggy C. Davis,* and *Anthony G. Amsterdam* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed by *Rollie R. Rogers* and *Lee J. Belstock* for the Colorado State Public Defender System, and by *Arthur M. Michaelson* for Amnesty International.

murder of Joel Medgebow. The circumstances surrounding the murder were testified to by the decedent's wife, who was present at the time it was committed. On July 10, 1973, Mrs. Medgebow awakened around 5 a. m. in the bedroom of her apartment to find her husband sitting up in bed, moaning. He was holding what she took to be a ruler.[1] Just then a third person jumped up, hit her several times with his fist, knocked her to the floor, and ran out of the house. It soon appeared that Medgebow had been fatally stabbed with a butcher knife. Mrs. Medgebow was not able to identify the attacker, although she was able to give a description of him.[2]

The petitioner's wife testified that on the night before the murder the petitioner had gone to work dressed in a white shirt and gray pants, and that he had returned at about 5:15 a. m. dressed in the same clothing but without shoes. She said that after a short conversation the petitioner had packed his clothes and departed. A young woman boarder, who overheard parts of the petitioner's conversation with his wife, testified that the petitioner had told his wife that he had stabbed and killed a man with a butcher knife while he was burglarizing a place, and that he had beaten a woman. One of the petitioner's coworkers testified that they had been drinking together until 3:30 or 3:45 on the morning of the murder and that the petitioner had then driven him home. He said that the petitioner at this time was wearing gray pants and a white shirt.

The jury found the defendant guilty as charged. Sub-

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[1] It appears that the "ruler" was actually the murder weapon which Medgebow had pulled from his own chest.

[2] She described the attacker as wearing light pants and a pinstriped shirt with long sleeves rolled up to the elbow. She also stated that the attacker was a medium-sized white male.

sequently, as provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment. Under the state law that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist.[3] At that hearing it was shown that the petitioner had one prior conviction, a 1967 charge of breaking and entering. The State also introduced the testimony of the physician (Dr. Crumbley) at the jail where the petitioner had been held pending trial. He testified that the petitioner had come to him as a physician, and told him that he was concerned that he would harm other people in the future, that he had had an uncontrollable desire to kill that had already resulted in his killing one man, that this desire was building up again, and that he wanted psychiatric help so he would not kill again. Dr. Crumbley also testified that, in his opinion, the petitioner was dangerous and would be a danger to his fellow inmates if imprisoned, but that his condition could be treated successfully.

The jury returned an advisory verdict recommending the sentence of death. The trial judge ordered an independent psychiatric evaluation of the petitioner, the results of which indicated that the petitioner was not, then or at the time of the murder, mentally impaired. The judge then sentenced the petitioner to death. In his written findings supporting the sentence, the judge found as aggravating circumstances that (1) the murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious, and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious

[3] See *infra*, at 248–250.

bodily harm and death to many persons. The judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed. 315 So. 2d 461 (1975). We granted certiorari, 423 U. S. 1082 (1976), to consider whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

## II

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg* v. *Georgia*, *ante*, at 168–187.

## III

### A

In response to *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Florida Legislature adopted new statutes that authorize the imposition of the death penalty on those convicted of first-degree murder. Fla. Stat. Ann. § 782.04 (1) (Supp. 1976–1977).[4] At the same time Florida

[4] The murder statute under which petitioner was convicted reads as follows:

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

"(b) In all cases under this section, the procedure set forth in

adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code. See § 921.141 (Supp. 1976–1977).[5] Under the new statute, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument on whether the death penalty shall be imposed.

At the conclusion of the hearing the jury is directed to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." §§ 921.141 (2)(b) and (c) (Supp. 1976–1977).[6] The jury's verdict is determined by

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s. 921.141 shall be followed in order to determine sentence of death or life imprisonment." Fla. Stat. Ann. § 782.04 (Supp. 1976–1977).

Another Florida statute authorizes imposition of the death penalty upon conviction of sexual battery of a child under 12 years of age. § 794.011 (2) (Supp. 1976–1977). We do not in this opinion consider the constitutionality of the death penalty for any offense other than first-degree murder.

[5] See Model Penal Code § 210.6 (Proposed Official Draft, 1962) (set out in *Gregg* v. *Georgia*, *ante*, at 193–194, n. 44).

[6] The aggravating circumstances are:

"(a) The capital felony was committed by a person under sentence of imprisonment.

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

"(c) The defendant knowingly created a great risk of death to many persons.

"(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt

majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State,* 322 So. 2d 908, 910 (1975). Accord, *Thompson* v. *State,* 328 So. 2d 1, 5

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to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) The capital felony was committed for pecuniary gain.

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The capital felony was especially heinous, atrocious, or cruel." § 921.141 (5) (Supp. 1976–1977).

The mitigating circumstances are:

"(a) The defendant has no significant history of prior criminal activity.

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's conduct or consented to the act.

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

"(e) The defendant acted under extreme duress or under the substantial domination of another person.

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

"(g) The age of the defendant at the time of the crime." § 921.141 (6) (Supp. 1976–1977).

(1976). Cf. *Spinkellink* v. *State*, 313 So. 2d 666, 671 (1975).[7]

The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances." § 921.141 (3) (Supp. 1976–1977).[8]

The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141 (4) (Supp. 1976–1977). The law differs from that of Georgia in that it does

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[7] *Tedder* has not always been cited when the Florida court has considered a judge-imposed death sentence following a jury recommendation of life imprisonment. See, *e. g.*, *Thompson* v. *State*, 328 So. 2d 1 (1976); *Douglas* v. *State*, 328 So. 2d 18 (1976); *Dobbert* v. *State*, 328 So. 2d 433 (1976). But in the latter case two judges relied on *Tedder* in separate opinions, one in support of reversing the death sentence and one in support of affirming it.

[8] In one case the Florida court upheld a death sentence where the trial judge had simply listed six aggravating factors as justification for the sentence he imposed. *Sawyer* v. *State*, 313 So. 2d 680 (1975). Since there were no mitigating factors, and since some of these aggravating factors arguably fell within the statutory categories, it is unclear whether the Florida court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so, since the capital-sentencing statute explicitly provides that "[a]ggravating circumstances shall be *limited* to the following [eight specified factors]." § 921.141 (5) (Supp. 1976–1977). (Emphasis added.) There is no such limiting language introducing the list of statutory mitigating factors. See § 921.141 (6) (Supp. 1976–1977). See also n. 14, *infra*.

not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." *State* v. *Dixon*, 283 So. 2d 1, 10 (1973).

On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must, *inter alia*, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not un-

like those considered by a Georgia sentencing jury, see *Gregg* v. *Georgia*, *ante*, at 197, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury.[9] This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 n. 15 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[10]

The Florida capital-sentencing procedures thus seek to

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[9] Because the trial judge imposes sentence, the Florida court has ruled that he may order preparation of a presentence investigation report to assist him in determining the appropriate sentence. See *Swan* v. *State*, 322 So. 2d 485, 488–489 (1975); *Songer* v. *State*, 322 So. 2d 481, 484 (1975). These reports frequently contain much information relevant to sentencing. See *Gregg* v. *Georgia*, *ante*, at 189 n. 37.

[10] See American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 1.1, Commentary, pp. 43–48 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967). See also *Gregg* v. *Georgia*, *ante*, at 189–192. In the words of the Florida court, "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." *State* v. *Dixon*, 283 So. 2d 1, 8 (1973).

assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." *Songer* v. *State*, 322 So. 2d 481, 484 (1975). See also *Sullivan* v. *State*, 303 So. 2d 632, 637 (1974). The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date. See *Taylor* v. *State*, 294 So. 2d 648 (1974); *Lamadline* v. *State*, 303 So. 2d 17 (1974); *Slater* v. *State*, 316 So. 2d 539 (1975); *Swan* v. *State*, 322 So. 2d 485 (1975); *Tedder* v. *State*, 322 So. 2d 908 (1975); *Halliwell* v. *State*, 323 So. 2d 557 (1975); *Thompson* v. *State*, 328 So. 2d 1 (1976); *Messer* v. *State*, 330 So. 2d 137 (1976).

Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is " 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " *Gregg* v. *Georgia*, *ante*, at 188, quoting *Furman* v. *Georgia*, 408 U. S., at 313 (WHITE, J., concurring). On its face the Florida system thus satisfies the constitutional deficiencies identified in *Furman*.

B

As in *Gregg*, the petitioner contends, however, that, while perhaps facially acceptable, the new sentencing procedures in actual effect are merely cosmetic, and that arbitrariness and caprice still pervade the system under which Florida imposes the death penalty.

(1)

The petitioner first argues that arbitrariness is inherent in the Florida criminal justice system because it allows discretion to be exercised at each stage of a criminal proceeding—the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, and, after conviction and unsuccessful appeal, the Executive's decision whether to commute a death sentence. As we noted in *Gregg*, this argument is based on a fundamental misinterpretation of *Furman*, and we reject it for the reasons expressed in *Gregg*. See *ante*, at 199.

(2)

The petitioner next argues that the new Florida sentencing procedures in reality do not eliminate the arbitrary infliction of death that was condemned in *Furman*. Basically he contends that the statutory aggravating and mitigating circumstances are vague and overbroad,[11] and that the statute gives no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case.

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[11] As in *Gregg*, we examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty. See *Gregg* v. *Georgia*, *ante*, at 201 n. 51.

(a)

Initially the petitioner asserts that the enumerated aggravating and mitigating circumstances are so vague and so broad that virtually "any capital defendant becomes a candidate for the death penalty . . . ." In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." §§ 921.141 (5)(h), (c) (Supp. 1976–1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.

That court has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder* v. *State*, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State* v. *Dixon*, 283 So. 2d, at 9. See also *Alford* v. *State*, 307 So. 2d 433, 445 (1975); *Halliwell* v. *State, supra*, at 561.[12] We

[12] The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See, *e. g.*, *Hallman* v. *State*, 305 So. 2d 180 (1974) (victim's throat slit with broken bottle); *Spinkellink* v. *State*, 313 So. 2d 666 (1975) ("career criminal" shot sleeping traveling companion); *Gardner* v. *State*, 313 So. 2d 675 (1975) (brutal beating and murder); *Alvord* v. *State*, 322 So. 2d 533 (1975) (three women killed by strangulation, one raped); *Douglas* v. *State*, 328 So. 2d 18 (1976) (depraved murder); *Henry* v. *State*, 328 So. 2d 430 (1976) (torture murder); *Dobbert* v. *State*, 328 So. 2d 433 (1976) (torture and killing of two children). But

cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See *Gregg* v. *Georgia, ante,* at 200–203.

In the only case, except for the instant case, in which the third aggravating factor—"[t]he defendant knowingly created a great risk of death to many persons"—was found, *Alvord* v. *State,* 322 So. 2d 533 (1975), the State Supreme Court held that the defendant created a great risk of death because he "obviously murdered two of the victims in order to avoid a surviving witness to the [first] murder." *Id.,* at 540.[13] As construed by the Supreme Court of Florida these provisions are not impermissibly vague.[14]

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the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in *Dixon* and applied in *Alford, Tedder,* and *Halliwell.*

[13] While it might be argued that this case broadens that construction, since only one person other than the victim was attacked at all and then only by being hit with a fist, this would be to read more into the State Supreme Court's opinion than is actually there. That court considered 11 claims of error advanced by the petitioner, including the trial judge's finding that none of the statutory mitigating circumstances existed. It did not, however, consider whether the findings as to each of the statutory aggravating circumstances were supported by the evidence. If only one aggravating circumstance had been found, or if some mitigating circumstance had been found to exist but not to outweigh the aggravating circumstances, we would be justified in concluding that the State Supreme Court had necessarily decided this point even though it had not expressly done so. However, in the circumstances of this case, when four separate aggravating circumstances were found and where each mitigating circumstance was expressly found *not* to exist, no such holding on the part of the State Supreme Court can be implied.

[14] The petitioner notes further that Florida's sentencing system fails to channel the discretion of the jury or judge because it

(b)

The petitioner next attacks the imprecision of the mitigating circumstances. He argues that whether a defendant acted "under the influence of extreme mental or emotional disturbance," whether a defendant's capacity "to conform his conduct to the requirements of law was substantially impaired," or whether a defendant's participation as an accomplice in a capital felony was "relatively minor," are questions beyond the capacity of a jury or judge to determine. See §§ 921.141 (6)(b), (f), (d) (Supp. 1976–1977).

He also argues that neither a jury nor a judge is capable of deciding how to weigh a defendant's age or determining whether he had a "significant history of prior criminal activity." See §§ 921.141 (6)(g), (a) (Supp. 1976–1977). In a similar vein the petitioner argues that it is not possible to make a rational determination whether there are "sufficient" aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered. See § 921.141 (Supp. 1976–1977).

While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned

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allows for consideration of nonstatutory aggravating factors. In the only case to approve such a practice, *Sawyer* v. *State*, 313 So. 2d 680 (1975), the Florida court recast the trial court's six nonstatutory aggravating factors into four aggravating circumstances—two of them statutory. As noted earlier, it is unclear that the Florida court would ever approve a death sentence based entirely on nonstatutory aggravating circumstances. See n. 8, *supra*.

mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

(c)

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.[15]

Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of

[15] *State* v. *Dixon*, 283 So. 2d, at 10.

rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. See, *e. g., Alford* v. *State,* 307 So. 2d, at 445; *Alvord* v. *State,* 322 So. 2d, at 540–541. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute. Cf. *Gregg* v. *Georgia, ante,* at 204–206. And any suggestion that the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it. See *supra,* at 253.[16]

## IV

Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of

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[16] The petitioner also argues that since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense, it will have an unbalanced view of the way that the typical jury treats a murder case and it will affirm death sentences under circumstances where the vast majority of judges would have imposed a sentence of life imprisonment. As we noted in *Gregg* v. *Georgia, ante,* at 204 n. 56, this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty.

its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed. See *Furman* v. *Georgia*, 408 U. S., at 310 (STEWART, J., concurring). Accordingly, the judgment before us is affirmed.

*It is so ordered.*

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 227.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 231.]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

There is no need to repeat the statement of the facts of this case and of the statutory procedure under which the death penalty was imposed, both of which are described in detail in the opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS. I agree with them, see Parts III–B (2)(a) and (b), *ante*, at 255–258, that although the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered. Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely but will be imposed with regularity; and consequently it cannot be said that the death penalty in

Florida as to those categories has ceased "to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Furman* v. *Georgia*, 408 U. S. 238, 311 (1972) (WHITE, J., concurring). Accordingly, the Florida statutory scheme for imposing the death penalty does not run afoul of this Court's holding in *Furman* v. *Georgia*.

For the reasons set forth in my opinion concurring in the judgment in *Gregg* v. *Georgia*, *ante*, at 224–225, and my dissenting opinion in *Roberts* v. *Louisiana*, *post*, at 348–350, this conclusion is not undercut by the possibility that some murderers may escape the death penalty solely through exercise of prosecutorial discretion or executive clemency. For the reasons set forth in my dissenting opinion in *Roberts* v. *Louisiana*, *post*, at 350–356, I also reject petitioner's argument that under the Eighth Amendment the death penalty may never be imposed under any circumstances.

I concur in the judgment of affirmance.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. See *Furman* v. *Georgia*, 408 U. S. 238, 405–414 (1972) (BLACKMUN, J., dissenting), and *id.*, at 375, 414, and 465.

# JUREK *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 75-5394. Argued March 30, 1976—Decided July 2, 1976

Petitioner, who was convicted of murder and whose death sentence was upheld on appeal, challenges the constitutionality of the Texas procedures enacted after this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238. The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations. Texas also adopted a new capital-sentencing procedure, which requires the jury to answer the following three questions in a proceeding that takes place after a verdict finding a person guilty of one of the specified murder categories: (1) whether the conduct of the defendant causing the death was committed deliberately and with the reasonable expectation that the death would result; (2) whether it is probable that the defendant would commit criminal acts of violence constituting a continuing threat to society; and (3) if raised by the evidence, whether the defendant's conduct was an unreasonable response to the provocation, if any, by the deceased. If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is affirmative the death sentence is imposed; if it finds that the answer to any question is negative a sentence of life imprisonment results. The Texas Court of Criminal Appeals in this case indicated that it will interpret the "continuing threat to society" question to mean that the jury could consider various mitigating factors. *Held:* The judgment is affirmed. Pp. 268-277; 277; 278-279; 279.

522 S. W. 2d 934, affirmed.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS concluded that:

1. The imposition of the death penalty is not *per se* cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Gregg, ante*, at 168-187. Pp. 268.

2. The Texas capital-sentencing procedures do not violate the Eighth and Fourteenth Amendments. Texas' action in narrowing capital offenses to five categories in essence requires the jury to find the existence of a statutory aggravating circumstance be-

fore the death penalty may be imposed, thus requiring the sentencing authority to focus on the particularized nature of the crime. And, though the Texas statute does not explicitly speak of mitigating circumstances, it has been construed to embrace the jury's consideration of such circumstances. Thus, as in the cases of *Gregg* v. *Georgia, ante,* p. 153, and *Proffitt* v. *Florida, ante,* p. 242, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. The Texas law has thus eliminated the arbitrariness and caprice of the system invalidated in *Furman.* Petitioner's contentions to the contrary are without substance. Pp. 268–276.

(a) His assertion that arbitrariness still pervades the entire Texas criminal justice system fundamentally misinterprets *Furman. Gregg, ante,* at 198–199. P. 274.

(b) Petitioner's contention that the second statutory question is unconstitutionally vague because it requires the prediction of human behavior lacks merit. The jury's task in answering that question is one that must commonly be performed throughout the American criminal justice system, and Texas law clearly satisfies the essential requirement that the jury have all possible relevant information about the individual defendant. Pp. 274–276.

THE CHIEF JUSTICE concurred in the judgment. See *Furman* v. *Georgia, supra,* at 375 (BURGER, C. J., dissenting). P. 277.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, concluded that under the revised Texas law the substantive crime of murder is narrowly defined and when murder occurs in one of the five circumstances detailed in the statute, the death penalty *must* be imposed if the jury makes the certain additional findings against the defendant. Petitioner's contentions that unconstitutionally arbitrary or discretionary statutory features nevertheless remain are without substance, *Roberts* v. *Louisiana, post,* at 348–350 (WHITE, J., dissenting); *Gregg* v. *Georgia, ante,* at 224–225 (WHITE, J., concurring in judgment), as is his assertion that the Eighth Amendment forbids the death penalty under any and all circumstances. *Roberts* v. *Louisiana, post,* at 350–356 (WHITE, J., dissenting). Pp. 278–279.

MR. JUSTICE BLACKMUN concurred in the judgment. See *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (BLACKMUN, J., dissenting), and *id.,* at 375, 414, and 465. P. 279.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by STEVENS, J. BURGER, C. J., filed a statement concurring in the judgment, *post*, p. 277. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 277. BLACKMUN, J., filed a statement concurring in the judgment, *post*, p. 279. BRENNAN, J., *ante*, p. 227, and MARSHALL, J., *ante*, p. 231, filed dissenting opinions.

*Anthony G. Amsterdam* argued the cause for petitioner. With him on the brief were *Jack Greenberg*, *James M. Nabrit III*, and *Peggy C. Davis*.

*John L. Hill*, Attorney General of Texas, argued the cause for respondent. With him on the brief were *Bert W. Pluymen*, Assistant Attorney General, and *Jim D. Vollers*.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae*. With him on the brief was *Deputy Solicitor General Randolph*. *William E. James*, Assistant Attorney General, argued the cause for the State of California as *amicus curiae*. With him on the brief were *Evelle J. Younger*, Attorney General, and *Jack R. Winkler*, Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEVENS.

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Texas violates the Eighth and Fourteenth Amendments to the Constitution.

I

The petitioner in this case, Jerry Lane Jurek, was charged by indictment with the killing of Wendy Adams

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**Arthur M. Michaelson* filed a brief for Amnesty International as *amicus curiae*.

"by choking and strangling her with his hands, and by drowning her in water by throwing her into a river . . . in the course of committing and attempting to commit kidnapping of and forcible rape upon the said Wendy Adams." [1]

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[1] At the time of the charged offense, Texas law provided:

"Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing." Tex. Penal Code, Art. 1256 (1973).

Under the new Texas Penal Code (effective Jan. 1, 1974), murder is now defined by § 19.02 (a):

"A person commits an offense if he:

"(1) intentionally or knowingly causes the death of an individual;

"(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

"(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

Texas law prescribed the punishment for murder as follows:

"(a) Except as provided in subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for life or for any term of years not less than two.

"(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

"(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

"(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

"(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

The evidence at his trial consisted of incriminating statements made by the petitioner,[2] the testimony of several people who saw the petitioner and the deceased during the day she was killed, and certain technical evidence. This evidence established that the petitioner, 22 years old at the time, had been drinking beer in the afternoon. He and two young friends later went driving together in his old pickup truck. The petitioner expressed a desire for sexual relations with some young girls they saw, but one of his companions said the girls were too young. The petitioner then dropped his two friends off at a pool hall. He was next seen talking to Wendy, who was 10 years old, at a public swimming pool where her grandmother had left her to swim. Other witnesses testified that they later observed a man resembling the petitioner driving an old pickup truck through town at a high rate of speed, with a young blond girl standing screaming in the bed of the truck. The last witness who saw them heard the girl crying "help me,

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"(4) the person committed the murder while escaping or attempting to escape from a penal institution;

"(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

"(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense." Tex. Penal Code, Art. 1257 (1973).

Article 1257 has been superseded by § 19.03 of the new Texas Penal Code, which is substantially similar to Art. 1257.

[2] The court held a separate hearing to determine whether these statements were given voluntarily, and concluded that they were. The question of the voluntariness of the confessions was also submitted to the jury. The Court of Criminal Appeals affirmed the admissibility of the statements. 522 S. W. 2d 934, 943 (1975).

help me." The witness tried to follow them, but lost them in traffic. According to the petitioner's statement, he took the girl to the river, choked her,[3] and threw her unconscious body in the river. Her drowned body was found downriver two days later.

At the conclusion of the trial the jury returned a verdict of guilty.

Texas law requires that if a defendant has been convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. Any relevant evidence may be introduced at this proceeding, and both prosecution and defense may present argument for or against the sentence of death. The jury is then presented with two (sometimes three) questions,[4] the answers to which determine whether a death sentence will be imposed.

During the punishment phase of the petitioner's trial, several witnesses for the State testified to the petitioner's bad reputation in the community. The petitioner's father countered with testimony that the petitioner had always been steadily employed since he had left school and that he contributed to his family's support.

The jury then considered the two statutory questions relevant to this case: (1) whether the evidence established beyond a reasonable doubt that the murder of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, and (2) whether the evidence established beyond a reasonable doubt that there was

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[3] The petitioner originally stated that he started choking Wendy when she angered him by criticizing him and his brother for their drinking. In a later statement he said that he choked her after she refused to have sexual relations with him and started screaming.

[4] See *infra*, at 269.

a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury unanimously answered "yes" to both questions, and the judge, therefore, in accordance with the statute, sentenced the petitioner to death. The Court of Criminal Appeals of Texas affirmed the judgment. 522 S. W. 2d 934 (1975).

We granted certiorari, 423 U. S. 1082, to consider whether the imposition of the death penalty in this case violates the Eighth and Fourteenth Amendments of the United States Constitution.

## II

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg* v. *Georgia, ante,* at 168–187.

## III

### A

After this Court held Texas' system for imposing capital punishment unconstitutional in *Branch* v. *Texas,* decided with *Furman* v. *Georgia,* 408 U. S. 238 (1972), the Texas Legislature narrowed the scope of its laws relating to capital punishment. The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee. See Tex. Penal Code § 19.03 (1974).

In addition, Texas adopted a new capital-sentencing procedure. See Tex. Code Crim. Proc., Art. 37.071 (Supp. 1975–1976). That procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the above categories of murder. The questions the jury must answer are these:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Art. 37.071 (b) (Supp. 1975–1976).

If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed. If the jury finds that the answer to any question is no, then a sentence of life imprisonment results. Arts. 37.071 (c), (e) (Supp. 1975–1976).[5] The law also provides for an expedited review by the Texas Court of Criminal Appeals. See Art. 37.071 (f) (Supp. 1975–1976).

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[5] The jury can answer "yes" only if all members agree; it can answer "no" if 10 of 12 members agree. Art. 37.071 (d) (Supp. 1975–1976). Texas law is unclear as to the procedure to be followed in the event that the jury is unable to answer the questions. See Vernon's Texas Codes Ann.—Penal § 19.03, Practice Commentary, p. 107 (1974).

The Texas Court of Criminal Appeals has thus far affirmed only two judgments imposing death sentences under its post-*Furman* law—in this case and in *Smith* v. *State*, No. 49,809 (Feb. 18, 1976) (rehearing pending; initially reported in advance sheet for 534 S. W. 2d but subsequently withdrawn from bound volume). In the present case the state appellate court noted that its law "limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the death penalty will only be imposed for the most serious crimes [and] . . . that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances." 522 S. W. 2d, at 939.

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. See *McGautha* v. *California*, 402 U. S. 183, 206 n. 16 (1971); Model Penal Code § 201.6, Comment 3, pp. 71–72 (Tent. Draft No. 9, 1959). In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. For example, the Texas statute requires the jury at the guilt-determining stage to consider whether the crime was committed in the course of a particular felony, whether it was committed for hire, or whether the defendant was an inmate of a penal institution at the time of its commission. Cf. *Gregg* v. *Georgia*, *ante*, at 165–166, n. 9; *Proffitt* v. *Florida*, *ante*, at 248–249, n. 6. Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed.

So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option—even potentially—for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.

But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson* v. *North Carolina, post,* at 303–305, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts* v. *Louisiana, post,* p. 325.[6] A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In *Gregg* v. *Georgia,* we today hold constitutionally valid a capital-sentencing system

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[6] When the drafters of the Model Penal Code considered a proposal that would have simply listed aggravating factors as sufficient reasons for imposition of the death penalty, they found the proposal unsatisfactory:

"Such an approach has the disadvantage, however, of according disproportionate significance to the enumeration of aggravating circumstances when what is rationally necessary is . . . the balancing of any aggravations against any mitigations that appear. The object sought is better attained, in our view, by requiring a finding that an aggravating circumstance has been established *and* a finding that there are no substantial mitigating circumstances." Model Penal Code § 201.6, Comment 3, p. 72 (Tent. Draft No. 9, 1959) (emphasis in original).

that directs the jury to consider any mitigating factors, and in *Proffitt* v. *Florida* we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances. The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

The second Texas statutory question [7] asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury

[7] The Texas Court of Criminal Appeals has not yet construed the first and third questions (which are set out in the text, *supra*, at 269); thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry. For example, the third question asks whether the conduct of the defendant was unreasonable in response to any provocation by the deceased. This might be construed to allow the jury to consider circumstances which, though not sufficient as a defense to the crime itself, might nevertheless have enough mitigating force to avoid the death penalty—a claim, for example, that a woman who hired an assassin to kill her husband was driven to it by his continued cruelty to her. We cannot, however, construe the statute; that power is reserved to the Texas courts.

could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand." 522 S. W. 2d, at 939–940.

In the only other case in which the Texas Court of Criminal Appeals has upheld a death sentence, it focused on the question of whether any mitigating factors were present in the case. See *Smith* v. *State,* No. 49,809 (Feb. 18, 1976). In that case the state appellate court examined the sufficiency of the evidence to see if a "yes" answer to question 2 should be sustained. In doing so it examined the defendant's prior conviction on narcotics charges, his subsequent failure to attempt to rehabilitate himself or obtain employment, the fact that he had not acted under duress or as a result of mental or emotional pressure, his apparent willingness to kill, his lack of remorse after the killing, and the conclusion of a psychiatrist that he had a sociopathic personality and that his patterns of conduct would be the same in the future as they had been in the past.

Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas

capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

B

As in the Georgia and Florida cases, however, the petitioner contends that the substantial legislative changes that Texas made in response to this Court's *Furman* decision are no more than cosmetic in nature and have in fact not eliminated the arbitrariness and caprice of the system held in *Furman* to violate the Eighth and Fourteenth Amendments.[8]

(1)

The petitioner first asserts that arbitrariness still pervades the entire criminal justice system of Texas—from the prosecutor's decision whether to charge a capital offense in the first place and then whether to engage in plea bargaining, through the jury's consideration of lesser included offenses, to the Governor's ultimate power to commute death sentences. This contention fundamentally misinterprets the *Furman* decision, and we reject it for the reasons set out in our opinion today in *Gregg* v. *Georgia, ante,* at 199.

(2)

Focusing on the second statutory question that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not

[8] See *Branch* v. *Texas,* decided with *Furman* v. *Georgia,* 408 U. S. 238 (1972).

mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct.[9] And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.[10] For those sentenced to prison, these same predictions must be made by parole authorities.[11] The task that a Texas jury

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[9] See, *e. g.*, American Bar Association Project on Standards for Criminal Justice, Pretrial Release § 5.1 (a) (Approved Draft 1968): "It should be presumed that the defendant is entitled to be released on order to appear or on his own recognizance. The presumption may be overcome by a finding that there is substantial risk of non-appearance . . . . In capital cases, the defendant may be detained pending trial if the facts support a finding that the defendant is likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice or will flee if released."

[10] See, *e. g.*, *id.*, Sentencing Alternatives and Procedures § 2.5 (c): "A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in a given case are:

"(i) Confinement is necessary in order to protect the public from further criminal activity by the defendant . . . ."

A similar conclusion was reached by the drafters of the Model Penal Code:

"The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

"(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime." Model Penal Code § 7.01 (1) (Proposed Official Draft 1962).

[11] See, *e. g.*, *id.*, § 305.9 (1):

"Whenever the Board of Parole considers the first release of a

must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

## IV

We conclude that Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution. *Furman* v. *Georgia*, 408 U. S., at 310 (STEWART, J., concurring).

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prisoner who is eligible for release on parole, it shall be the policy of the Board to order his release, unless the Board is of the opinion that his release should be deferred because:

"(a) there is substantial risk that he will not conform to the conditions of parole . . . ."

Accordingly, the judgment of the Texas Court of Criminal Appeals is affirmed.

*It is so ordered.*

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 227.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 231.]

MR. CHIEF JUSTICE BURGER, concurring in judgment.

I concur in the judgment. See *Furman* v. *Georgia*, 408 U. S. 238, 375 (1972) (BURGER, C. J., dissenting).

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

Following the invalidation of the Texas capital punishment statute in *Branch* v. *Texas*, decided with *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Texas Legislature re-enacted the death penalty for five types of murder, including murders committed in the course of certain felonies and required that it be imposed providing that, after returning a guilty verdict in such murder cases and after a sentencing proceeding at which all relevant evidence is admissible, the jury answers two questions in the affirmative—and a third if raised by the evidence:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unrea-

sonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc., Art. 37.071 (b) (Supp. 1975–1976).

The question in this case is whether the death penalty imposed on Jerry Lane Jurek for the crime of felony murder may be carried out consistently with the Eighth and Fourteenth Amendments.

The opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS describes, and I shall not repeat, the facts of the crime and proceedings leading to the imposition of the death penalty when the jury unanimously gave its affirmative answers to the relevant questions posed in the judge's post-verdict instructions. I also agree with that opinion that the judgment of the Texas Court of Criminal Appeals, which affirmed the conviction and judgment, must be affirmed here. 522 S. W. 2d 934 (1975).

For the reasons stated in my dissent in *Roberts* v. *Louisiana*, *post*, at 350–356, I cannot conclude that the Eighth Amendment forbids the death penalty under any and all circumstances. I also cannot agree with petitioner's other major contention that under the new Texas statute and the State's criminal justice system in general, the criminal jury and other law enforcement officers exercise such a range of discretion that the death penalty will be imposed so seldom, so arbitrarily, and so freakishly that the new statute suffers from the infirmities which *Branch* v. *Texas* found in its predecessor. Under the revised law, the substantive crime of murder is defined; and when a murder occurs in one of the five circumstances set out in the statute, the death penalty *must* be imposed if the jury also makes the certain additional findings against the defendant. Petitioner claims that the additional questions upon which the death sentence depends are so vague that in essence the

jury possesses standardless sentencing power; but I agree with JUSTICES STEWART, POWELL, and STEVENS that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them. The statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions. As of February of this year, 33 persons, including petitioner, had been sentenced to death under the Texas murder statute. I cannot conclude at this juncture that the death penalty under this system will be imposed so seldom and arbitrarily as to serve no useful penological function and hence fall within reach of the decision announced by five Members of the Court in *Furman* v. *Georgia*.

Nor, for the reasons I have set out in *Roberts, post*, at 348–350, and *Gregg, ante*, at 224–225, am I convinced that this conclusion should be modified because of the alleged discretion which is exercisable by other major functionaries in the State's criminal justice system. Furthermore, as JUSTICES STEWART, POWELL, and STEVENS state and as the Texas Court of Criminal Appeals has noted, the Texas capital punishment statute limits the imposition of the death penalty to a narrowly defined group of the most brutal crimes and aims at limiting its imposition to similar offenses occurring under similar circumstances. 522 S. W. 2d, at 939.

I concur in the judgment of affirmance.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. See *Furman* v. *Georgia*, 408 U. S. 238, 405–414 (1972) (BLACKMUN, J., dissenting), and *id.*, at 375, 414, and 465.

# WOODSON ET AL. *v.* NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 75-5491. Argued March 31, 1976—Decided July 2, 1976

Following this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238, the North Carolina law that previously had provided that in cases of first-degree murder the jury in its unbridled discretion could choose whether the convicted defendant should be sentenced to death or life imprisonment was changed to make the death penalty mandatory for that crime. Petitioners, whose convictions of first-degree murder and whose death sentences under the new statute were upheld by the Supreme Court of North Carolina, have challenged the statute's constitutionality. *Held:* The judgment is reversed insofar as it upheld the death sentences, and the case is remanded. Pp. 285–305; 305–306; 306.

287 N. C. 578, 215 S. E. 2d 607, reversed and remanded.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS concluded that North Carolina's mandatory death sentence statute violates the Eighth and Fourteenth Amendments. Pp. 285–305.

(a) The Eighth Amendment serves to assure that the State's power to punish is "exercised within the limits of civilized standards," *Trop* v. *Dulles*, 356 U. S. 86, 100 (plurality opinion), and central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment, *Gregg* v. *Georgia*, *ante*, at 176–182. P. 288.

(b) Though at the time the Eighth Amendment was adopted, all the States provided mandatory death sentences for specified offenses, the reaction of jurors and legislators to the harshness of those provisions has led to the replacement of automatic death penalty statutes with discretionary jury sentencing. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—conclusively point to the repudiation of automatic death sentences. "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender," *Williams* v. *New York*, 337 U. S. 241, 247. North Carolina's mandatory death penalty statute for first-degree mur-

der, which resulted from the state legislature's adoption of the State Supreme Court's analysis that *Furman* required the severance of the discretionary feature of the old law, is a constitutionally impermissible departure from contemporary standards respecting imposition of the unique and irretrievable punishment of death. Pp. 289–301.

(c) The North Carolina statute fails to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in that case was the conviction that vesting a jury with standardless sentencing power violated the Eighth and Fourteenth Amendments, yet that constitutional deficiency is not eliminated by the mere formal removal of all sentencing power from juries in capital cases. In view of the historic record, it may reasonably be assumed that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. But the North Carolina statute provides no standards to guide the jury in determining which murderers shall live and which shall die. Pp. 302–303.

(d) The respect for human dignity underlying the Eighth Amendment, *Trop* v. *Dulles*, *supra*, at 100 (plurality opinion), requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death. The North Carolina statute impermissibly treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty. Pp. 303–305.

MR. JUSTICE BRENNAN concurred in the judgment for the reasons stated in his dissenting opinion in *Gregg* v. *Georgia*, *ante*, p. 227. P. 305.

MR. JUSTICE MARSHALL, being of the view that death is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, concurred in the judgment. *Gregg* v. *Georgia*, *ante*, p. 231 (MARSHALL, J., dissenting). P. 306.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by STEWART, J. BRENNAN, J., *post*, p. 305, and MARSHALL, J., *post*, p. 306, filed statements concurring in the judgment. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 306. BLACKMUN,

J., filed a dissenting statement, *post*, p. 307. REHNQUIST, J., filed a dissenting opinion, *post*, p. 308.

*Anthony G. Amsterdam* argued the cause for petitioners. With him on the brief were *Jack Greenberg, James M. Nabrit III, Peggy C. Davis, Adam Stein, Charles L. Becton, Edward H. McCormick,* and *W. A. Johnson.*

*Sidney S. Eagles, Jr.,* Special Deputy Attorney General of North Carolina, argued the cause for respondent. With him on the brief were *Rufus L. Edmisten,* Attorney General, *James E. Magner, Jr.,* Assistant Attorney General, *Jean A. Benoy,* Deputy Attorney General, and *Noel L. Allen* and *David S. Crump,* Associate Attorneys General.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae.* With him on the brief was *Deputy Solicitor General Randolph. William E. James,* Assistant Attorney General, argued the cause for the State of California as *amicus curiae.* With him on the brief were *Evelle J. Younger,* Attorney General, and *Jack R. Winkler,* Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEWART.

The question in this case is whether the imposition of a death sentence for the crime of first-degree murder under the law of North Carolina violates the Eighth and Fourteenth Amendments.

I

The petitioners were convicted of first-degree murder as the result of their participation in an armed robbery

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**Arthur M. Michaelson* filed a brief for Amnesty International as *amicus curiae.*

of a convenience food store, in the course of which the cashier was killed and a customer was seriously wounded. There were four participants in the robbery: the petitioners James Tyrone Woodson and Luby Waxton and two others, Leonard Tucker and Johnnie Lee Carroll. At the petitioners' trial Tucker and Carroll testified for the prosecution after having been permitted to plead guilty to lesser offenses; the petitioners testified in their own defense.

The evidence for the prosecution established that the four men had been discussing a possible robbery for some time. On the fatal day Woodson had been drinking heavily. About 9:30 p. m., Waxton and Tucker came to the trailer where Woodson was staying. When Woodson came out of the trailer, Waxton struck him in the face and threatened to kill him in an effort to make him sober up and come along on the robbery. The three proceeded to Waxton's trailer where they met Carroll. Waxton armed himself with a nickel-plated derringer, and Tucker handed Woodson a rifle. The four then set out by automobile to rob the store. Upon arriving at their destination Tucker and Waxton went into the store while Carroll and Woodson remained in the car as lookouts. Once inside the store, Tucker purchased a package of cigarettes from the woman cashier. Waxton then also asked for a package of cigarettes, but as the cashier approached him he pulled the derringer out of his hip pocket and fatally shot her at point-blank range. Waxton then took the money tray from the cash register and gave it to Tucker, who carried it out of the store, pushing past an entering customer as he reached the door. After he was outside, Tucker heard a second shot from inside the store, and shortly thereafter Waxton emerged, carrying a handful of paper money. Tucker and Waxton got in the car and the four drove away.

The petitioners' testimony agreed in large part with this version of the circumstances of the robbery. It differed diametrically in one important respect: Waxton claimed that he never had a gun, and that Tucker had shot both the cashier and the customer.

During the trial Waxton asked to be allowed to plead guilty to the same lesser offenses to which Tucker had pleaded guilty,[1] but the solicitor refused to accept the pleas.[2] Woodson, by contrast, maintained throughout the trial that he had been coerced by Waxton, that he was therefore innocent, and that he would not consider pleading guilty to any offense.

The petitioners were found guilty on all charges,[3] and, as was required by statute, sentenced to death. The Supreme Court of North Carolina affirmed. 287 N. C. 578, 215 S. E. 2d 607 (1975). We granted certiorari, 423 U. S. 1082 (1976), to consider whether the imposition of the death penalties in this case comports with

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[1] Tucker had been allowed to plead guilty to charges of accessory after the fact to murder and to armed robbery. He was sentenced to 10 years' imprisonment on the first charge, and to not less than 20 years nor more than 30 years on the second, the sentences to run concurrently.

[2] The solicitor gave no reason for refusing to accept Waxton's offer to plead guilty to a lesser offense. The Supreme Court of North Carolina, in finding that the solicitor had not abused his discretion, noted:

"The evidence that Waxton planned and directed the robbery and that he fired the shots which killed Mrs. Butler and wounded Mr. Stancil is overwhelming. No extenuating circumstances gave the solicitor any incentive to accept the plea he tendered at the close of the State's evidence." 287 N. C. 578, 595–596, 215 S. E. 2d 607, 618 (1975).

[3] In addition to first-degree murder, both petitioners were found guilty of armed robbery. Waxton was also found guilty of assault with a deadly weapon with intent to kill, a charge arising from the wounding of the customer.

the Eighth and Fourteenth Amendments to the United States Constitution.

II

The petitioners argue that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg* v. *Georgia, ante,* at 168–187.

III

At the time of this Court's decision in *Furman* v. *Georgia,* 408 U. S. 238 (1972), North Carolina law provided that in cases of first-degree murder, the jury in its unbridled discretion could choose whether the convicted defendant should be sentenced to death or to life imprisonment.[4] After the *Furman* decision the Supreme Court of North Carolina in *State* v. *Waddell,* 282 N. C. 431, 194 S. E. 2d 19 (1973), held unconstitutional the provision of the death penalty statute that gave the jury the option of returning a verdict of guilty without cap-

[4] The murder statute in effect in North Carolina until April 1974 read as follows:

"§ 14–17. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." N. C. Gen. Stat. § 14–17 (1969).

ital punishment, but held further that this provision was severable so that the statute survived as a mandatory death penalty law.[5]

The North Carolina General Assembly in 1974 followed the court's lead and enacted a new statute that was essentially unchanged from the old one except that it made the death penalty mandatory. The statute now reads as follows:

> "*Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison." N. C. Gen. Stat. §14–17 (Cum. Supp. 1975).

It was under this statute that the petitioners, who committed their crime on June 3, 1974, were tried, convicted, and sentenced to death.

North Carolina, unlike Florida, Georgia, and Texas, has thus responded to the *Furman* decision by making death the mandatory sentence for all persons convicted

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[5] The court characterized the effect of the statute without the invalid provision as follows:

"Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge." 282 N. C., at 445, 194 S. E. 2d, at 28–29.

of first-degree murder.[6] In ruling on the constitutionality of the sentences imposed on the petitioners under this North Carolina statute, the Court now addresses for the first time the question whether a death sentence returned pursuant to a law imposing a mandatory death penalty for a broad category of homicidal offenses [7] constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments.[8] The issue, like that explored in *Furman,* involves the procedure employed by the State to select persons for the unique and irreversible penalty of death.[9]

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[6] North Carolina also has enacted a mandatory death sentence statute for the crime of first-degree rape. N. C. Gen. Stat. § 14–21 (Cum. Supp. 1975).

[7] This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender. We thus express no opinion regarding the constitutionality of such a statute. See n. 25, *infra.*

[8] The Eighth Amendment's proscription of cruel and unusual punishments has been held to be applicable to the States through the Fourteenth Amendment. See *Robinson* v. *California,* 370 U. S. 660 (1962).

The Court's decision in *Furman* v. *Georgia,* 408 U. S. 238 (1972), involved statutes providing for jury discretion in the imposition of death sentences. Several members of the Court in *Furman* expressly declined to state their views regarding the constitutionality of mandatory death sentence statutes. See *id.,* at 257 (Douglas, J., concurring); *id.,* at 307 (STEWART, J., concurring); *id.,* at 310–311 (WHITE, J., concurring).

[9] The petitioners here, as in the other four death penalty cases before the Court, contend that their sentences were imposed in violation of the Constitution because North Carolina has failed to eliminate discretion from all phases of its procedure for imposing capital punishment. We have rejected similar claims today in *Gregg, Proffitt,* and *Jurek.* The mandatory nature of the North Carolina death penalty statute for first-degree murder presents a different question under the Eighth and Fourteenth Amendments.

A

The Eighth Amendment stands to assure that the State's power to punish is "exercised within the limits of civilized standards." *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion). See *id.*, at 101; *Weems* v. *United States*, 217 U. S. 349, 373, 378 (1910); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 468–469 (1947) (Frankfurter, J., concurring);[10] *Robinson* v. *California*, 370 U. S. 660, 666 (1962); *Furman* v. *Georgia*, 408 U. S., at 242 (Douglas, J., concurring); *id.*, at 269–270 (BRENNAN, J., concurring); *id.*, at 329 (MARSHALL, J., concurring); *id.*, at 382–383 (BURGER, C. J., dissenting); *id.*, at 409 (BLACKMUN, J., dissenting); *id.*, at 428–429 (POWELL, J., dissenting). Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in *Gregg* v. *Georgia*, *ante*, at 176–182, indicia of societal values identified in prior opinions include history and traditional usage,[11] legislative enactments,[12] and jury determinations.[13]

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[10] Mr. Justice Frankfurter contended that the Eighth Amendment did not apply to the States through the Fourteenth Amendment. He believed, however, that the Due Process Clause of the Fourteenth Amendment itself "expresses a demand for civilized standards." *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 468 (concurring opinion).

[11] See *Trop* v. *Dulles*, 356 U. S. at 99 (plurality opinion) (dictum). See also *Furman* v. *Georgia*, *supra*, at 291 (BRENNAN, J., concurring).

[12] See *Weems* v. *United States*, 217 U. S. 349, 377 (1910) (noting that the punishment of *cadena temporal* at issue in that case had "no fellow in American legislation"); *Furman* v. *Georgia*, *supra*, at 436–437 (POWELL, J., dissenting); *Gregg* v. *Georgia*, *ante*, at 179–181.

[13] See *Witherspoon* v. *Illinois*, 391 U. S. 510, 519, and n. 15 (1968); *McGautha* v. *California*, 402 U. S. 183, 201–202 (1971); *Furman* v. *Georgia*, *supra*, at 388 (BURGER, C. J., dissenting); *id.*, at 439–441 (POWELL, J., dissenting) ("Any attempt to discern, there-

In order to provide a frame for assessing the relevancy of these factors in this case we begin by sketching the history of mandatory death penalty statutes in the United States. At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.[14] Although the range of capital offenses in the American Colonies was quite limited in comparison to the more than 200 offenses then punishable by death in England,[15] the Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy.[16] As at common law, all homicides that were not involuntary, provoked, justified, or excused constituted murder and were automatically punished by death.[17] Almost from the outset jurors reacted unfavorably to the harshness of mandatory death sentences.[18] The States initially responded to this ex-

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fore, where prevailing standards of decency lie must take careful account of the jury's response to the question of capital punishment").

[14] See H. Bedau, The Death Penalty in America 5–6, 15, 27–28 (rev. ed. 1967) (hereafter Bedau).

[15] See *id.*, at 1–2; R. Bye, Capital Punishment in the United States 1–2 (1919) (hereafter Bye).

[16] See Bedau 6; Bye 2–3 (most New England Colonies made 12 offenses capital; Rhode Island, with 10 capital crimes, was the "mildest of all of the colonies"); Hartung, Trends in the Use of Capital Punishment, 284 Annals of Am. Academy of Pol. and Soc. Sci. 8, 10 (1952) ("The English colonies in this country had from ten to eighteen capital offenses").

[17] See Bedau 23–24.

[18] See *id.*, at 27; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099, 1102 (1953); Mackey, The Inutility of Mandatory Capital Punishment: An Historical Note,

pression of public dissatisfaction with mandatory statutes by limiting the classes of capital offenses.[19]

This reform, however, left unresolved the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences. In 1794, Pennsylvania attempted to alleviate the undue severity of the law by confining the mandatory death penalty to "murder of the first degree" encompassing all "wilful, deliberate and premeditated" killings. Pa. Laws 1794 c. 1766.[20] Other jurisdictions, including Virginia and Ohio, soon enacted similar measures, and within a generation the practice spread to most of the States.[21]

Despite the broad acceptance of the division of murder into degrees, the reform proved to be an unsatisfactory means of identifying persons appropriately punishable by death. Although its failure was due in part to the amorphous nature of the controlling concepts of will-

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54 B. U. L. Rev. 32 (1974); *McGautha* v. *California*, *supra*, at 198–199; *Andres* v. *United States*, 333 U. S. 740, 753 (1948) (Frankfurter, J., concurring); *Winston* v. *United States*, 172 U. S. 303, 310 (1899).

[19] See Bye 5. During the colonial period, Pennsylvania in 1682 under the Great Law of William Penn limited capital punishment to murder. Following Penn's death in 1718, however, Pennsylvania greatly expanded the number of capital offenses. See Hartung, *supra*, n. 16, at 9–10.

Many States during the early 19th century significantly reduced the number of crimes punishable by death. See Davis, The Movement to Abolish Capital Punishment in America, 1787–1861, 63 Am. Hist. Rev. 23, 27, and n. 15 (1957).

[20] See Bedau 24.

[21] See *ibid.*; Davis, *supra*, at 26–27, n. 13. By the late 1950's, some 34 States had adopted the Pennsylvania formulation, and only 10 States retained a single category of murder as defined at common law. See American Law Institute, Model Penal Code § 201.6, Comment 2, p. 66 (Tent. Draft No. 9, 1959).

fulness, deliberateness, and premeditation,[22] a more fundamental weakness of the reform soon became apparent. Juries continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime.[23]

The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first States to abandon mandatory death sentences in favor of discretionary death penalty statutes.[24] This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty. By the turn of the century, 23 States and the Federal Government had made death sentences discretionary for first-degree murder and other capital offenses. During the next two decades 14 additional States replaced their mandatory death penalty statutes. Thus, by the end of World War I, all but eight States, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether. By 1963, all of these remaining jurisdic-

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[22] See *McGautha* v. *California*, *supra*, at 198–199.

[23] See Bedau 27; Mackey, *supra*, n. 18; *McGautha* v. *California*, *supra*, at 199.

[24] See Tenn. Laws 1837–1838, c. 29; Ala. Laws 1841; La. Laws 1846, Act No. 139. See also W. Bowers, Executions in America 7 (1974).

Prior to the Tennessee reform in 1838, Maryland had changed from a mandatory to an optional death sentence for the crimes of treason, rape, and arson. Md. Laws 1809, c. 138. For a time during the early colonial period Massachusetts, as part of its "Capitall Lawes" of 1636, apparently had a nonmandatory provision for the crime of rape. See Bedau 28.

tions had replaced their automatic death penalty statutes with discretionary jury sentencing.[25]

The history of mandatory death penalty statutes in

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[25] See Bowers, *supra*, at 7–9 (Table 1–2 sets forth the date each State adopted discretionary jury sentencing); Brief for United States as *Amicus Curiae* in *McGautha* v. *California*, O. T. 1970, No. 70–203, App. B (listing statutes in each State initially introducing discretionary jury sentencing in capital cases), App. C (listing state statutes in force in 1970 providing for discretionary jury sentencing in capital murder cases).

Prior to this Court's 1972 decision in *Furman* v. *Georgia*, 408 U. S. 238, there remained a handful of obscure statutes scattered among the penal codes in various States that required an automatic death sentence upon conviction of a specified offense. These statutes applied to such esoteric crimes as trainwrecking resulting in death, perjury in a capital case resulting in the execution of an innocent person, and treason against a state government. See Bedau 46–47 (1964 compilation). The most prevalent of these statutes dealt with the crime of treason against state governments. *Ibid.* It appears that no one has ever been prosecuted under these or other state treason laws. See Hartung, *supra*, n. 16, at 10. See also T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute 1 (1959) (discussing the Michigan statute, subsequently repealed in 1963, and the North Dakota statute). Several States retained mandatory death sentences for perjury in capital cases resulting in the execution of an innocent person. Data covering the years from 1930 to 1961 indicate, however, that no State employed its capital perjury statute during that period. See Bedau 46.

The only category of mandatory death sentence statutes that appears to have had any relevance to the actual administration of the death penalty in the years preceding *Furman* concerned the crimes of murder or assault with a deadly weapon by a life-term prisoner. Statutes of this type apparently existed in five States in 1964. See *id.*, at 46–47. In 1970, only five of the more than 550 prisoners under death sentence across the country had been sentenced under a mandatory death penalty statute. Those prisoners had all been convicted under the California statute applicable to assaults by life-term prisoners. See Brief For NAACP Legal Defense and Educational Fund, Inc., et al., as *Amici Curiae* in *McGautha* v. *California*, O. T. 1970, No. 70–203, p. 15 n. 19. We have no occasion in

the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences. At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict. As we have seen, the initial movement to reduce the number of capital offenses and to separate murder into degrees was prompted in part by the reaction of jurors as well as by reformers who objected to the imposition of death as the penalty for any crime. Nineteenth century journalists, statesmen, and jurists repeatedly observed that jurors were often deterred from convicting palpably guilty men of first-degree murder under mandatory statutes.[26] Thereafter, continuing evidence of jury reluctance to convict persons of capital offenses in mandatory death penalty jurisdictions resulted in legislative authorization of discretionary jury sentencing—by Congress for federal crimes in 1897,[27] by North Carolina in 1949,[28] and by Congress for the District of Columbia in 1962.[29]

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this case to examine the constitutionality of mandatory death sentence statutes applicable to prisoners serving life sentences.

[26] See Mackey, *supra*, n. 18.

[27] See H. R. Rep. No. 108, 54th Cong., 1st Sess., 2 (1896) (noting that the modification of the federal capital statutes to make the death penalty discretionary was in harmony with "a growing public sentiment," quoting H. R. Rep. No. 545, 53d Cong., 2d Sess., 1 (1894)); S. Rep. No. 846, 53d Cong., 3d Sess. (1895).

[*Footnotes 28 and 29 are on p. 294*]

As we have noted today in *Gregg* v. *Georgia*, *ante*, at 179–181, legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining con-

[28] See Report of the Special Commission for the Improvement of the Administration of Justice, North Carolina, Popular Government 13 (Jan. 1949).

[29] See unpublished Hearings on S. 138 before the Subcommittee on the Judiciary of the Senate Committee on the District of Columbia 19–20 (May 17, 1961) (testimony of Sen. Keating). Data compiled by a former United States Attorney for the District of Columbia indicated that juries convicted defendants of first-degree murder in only 12 of the 60 jury trials for first-degree murder held in the District of Columbia between July 1, 1953, and February 1960. *Ibid.* The conviction rate was "substantially below the general average in prosecuting other crimes." *Id.*, at 20. The lower conviction rate was attributed to the reluctance of jurors to impose the harsh consequences of a first-degree murder conviction in cases where the record might justify a lesser punishment. *Ibid.* See McCafferty, Major Trends in the Use of Capital Punishment, 1 Am. Crim. L. Q. No. 2, pp. 9, 14–15 (1963) (discussing a similar study of first-degree murder cases in the District of Columbia during the period July 1, 1947, through June 30, 1958).

A study of the death penalty submitted to the American Law Institute noted that juries in Massachusetts and Connecticut had "for many years" resorted to second-degree murder convictions to avoid the consequences of those States' mandatory death penalty statutes for first-degree murder, prior to their replacement with discretionary sentencing in 1951. See Sellin, *supra*, n. 25, at 13.

A 1973 Pennsylvania legislative report surveying the available literature analyzing mandatory death sentence statutes concluded:

"Although the data collection techniques in some instances are weak, the uniformity of the conclusions in substantiating what these authors termed 'jury nullification' (i. e. refusal to convict because of the required penalty) is impressive. Authors on both sides of the capital punishment debate reached essentially the same conclusions. Authors writing about the mandatory death penalty who wrote in 1892 reached the same conclusions as persons writing in the 1950's and 1960's." McCloskey, A Review of the Literature Contrasting Mandatory and Discretionary Systems of Sentencing Capital Cases, in Report of the Governor's Study Commission on Capital Punishment 100, 101 (Pa., 1973).

temporary standards of decency. The consistent course charted by the state legislatures and by Congress since the middle of the past century demonstrates that the aversion of jurors to mandatory death penalty statutes is shared by society at large.[30]

Still further evidence of the incompatibility of mandatory death penalties with contemporary values is provided by the results of jury sentencing under discretionary statutes. In *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), the Court observed that "one of the most important functions any jury can perform" in exercising its discretion to choose "between life imprisonment and capital punishment" is "to maintain a link between contemporary community values and the penal system." *Id.*, at 519, and n. 15. Various studies indicate that even in first-degree murder cases juries with sentencing discretion do not impose the death penalty "with any great frequency." H. Kalven & H. Zeisel, The American Jury 436 (1966).[31] The actions of sentencing juries sug-

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[30] Not only have mandatory death sentence laws for murder been abandoned by legislature after legislature since Tennessee replaced its mandatory statute 138 years ago, but, with a single exception, no State prior to this Court's *Furman* decision in 1972 ever returned to a mandatory scheme after adopting discretionary sentencing. See Bedau 30; Bowers, *supra*, n. 29, at 9. Vermont, which first provided for jury discretion in 1911, was apparently prompted to return to mandatory sentencing by a "veritable crime wave of twenty murders" in 1912. See Bedau 30. Vermont reinstituted discretionary jury sentencing in 1957.

[31] Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases. See *Furman* v. *Georgia*, 408 U. S., at 386–387, n. 11 (BURGER, C. J., dissenting); *id.*, at 435–436, n. 19 (POWELL, J., dissenting); Brief for Petitioner in *Aikens* v. *California*, O. T. 1971, No. 68–5027, App. F (collecting data from a number of jurisdictions indicating that the per-

gest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers.

Although the Court has never ruled on the constitutionality of mandatory death penalty statutes, on several occasions dating back to 1899 it has commented upon our society's aversion to automatic death sentences. In *Winston* v. *United States*, 172 U. S. 303 (1899), the Court noted that the "hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death." *Id.*, at 310.[32] Fifty years after *Winston*, the Court underscored the marked transformation in our attitudes toward mandatory sentences: "The belief no longer prevails that every offense in a like legal category calls for an identical

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centage of death sentences in many States was well below 20%). Statistics compiled by the Department of Justice show that only 66 convicted murderers were sentenced to death in 1972. See Law Enforcement Assistance Administration, Capital Punishment, 1971–1972, Table 7a (National Prisoner Statistics Bulletin Dec. 1974). (The figure does not include persons retained in local facilities during the pendency of their appeals.)

[32] Later, in *Andres* v. *United States*, Mr. Justice Frankfurter observed that the 19th century movement leading to the passage of legislation providing for discretionary sentencing in capital cases "was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction." 333 U. S., at 753 (concurring opinion). The Court in *Andres* noted that the decision of Congress at the end of the 19th century to replace mandatory death sentences with discretionary jury sentencing for federal capital crimes was prompted by "[d]issatisfaction over the harshness and antiquity of the federal criminal laws." *Id.*, at 747–748, n. 11.

punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . ." *Williams* v. *New York*, 337 U. S. 241, 247 (1949).

More recently, the Court in *McGautha* v. *California*, 402 U. S. 183 (1971), detailed the evolution of discretionary imposition of death sentences in this country, prompted by what it termed the American "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." *Id.*, at 198. See *id.*, at 198–202. Perhaps the one important factor about evolving social values regarding capital punishment upon which the Members of the *Furman* Court agreed was the accuracy of *McGautha*'s assessment of our Nation's rejection of mandatory death sentences. See *Furman* v. *Georgia*, 408 U. S., at 245–246 (Douglas, J., concurring); *id.*, at 297–298 (BRENNAN, J., concurring); *id.*, at 339 (MARSHALL, J., concurring); *id.*, at 402–403 (BURGER, C. J., with whom BLACKMUN, POWELL, and REHNQUIST, JJ., joined, dissenting); *id.*, at 413 (BLACKMUN, J., dissenting). MR. JUSTICE BLACKMUN, for example, emphasized that legislation requiring an automatic death sentence for specified crimes would be "regressive and of an antique mold" and would mark a return to a "point in our criminology [passed beyond] long ago." *Ibid.* THE CHIEF JUSTICE, speaking for the four dissenting Justices in *Furman*, discussed the question of mandatory death sentences at some length:

> "I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of 'the common-law rule imposing a mandatory death sentence on all convicted murderers.' 402 U. S., at 198. As the concurring opinion of MR. JUSTICE MARSHALL shows, [408

> U. S.,] at 339, the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measured by the category of the crime committed. This change in sentencing practice was greeted by the Court as a humanizing development. See *Winston* v. *United States*, 172 U. S. 303 (1899); cf. *Calton* v. *Utah*, 130 U. S. 83 (1889). See also *Andres* v. *United States*, 333 U. S. 740, 753 (1948) (Frankfurter, J., concurring)." *Id.*, at 402.

Although it seems beyond dispute that, at the time of the *Furman* decision in 1972, mandatory death penalty statutes had been renounced by American juries and legislatures, there remains the question whether the mandatory statutes adopted by North Carolina and a number of other States following *Furman* evince a sudden reversal of societal values regarding the imposition of capital punishment. In view of the persistent and unswerving legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for more than 130 years until *Furman*,[33] it seems evident that the post-*Furman* enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing.[34] The fact that some

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[33] See n. 30, *supra*.

[34] A study of public opinion polls on the death penalty concluded that "despite the increasing approval for the death penalty reflected in opinion polls during the last decade, there is evidence that many people supporting the general idea of capital punishment want its administration to depend on the circumstances of the case, the character of the defendant, or both." Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan. L. Rev. 1245, 1267 (1974). One poll discussed by the authors revealed that a "substantial majority" of persons opposed mandatory capital punish-

States have adopted mandatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.[35]

A brief examination of the background of the current North Carolina statute serves to reaffirm our assessment of its limited utility as an indicator of contemporary values regarding mandatory death sentences. Before 1949, North Carolina imposed a mandatory death sentence on any person convicted of rape or first-degree murder. That year, a study commission created by the state legislature recommended that juries be granted discretion to recommend life sentences in all capital cases:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our

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ment. *Id.*, at 1253. Moreover, the public through the jury system has in recent years applied the death penalty in anything but a mandatory fashion. See n. 31, *supra*.

[35] The fact that, as MR. JUSTICE REHNQUIST's dissent properly notes, some States "preferred mandatory capital punishment to no capital punishment at all," *post*, at 313, is entitled to some weight. But such an artificial choice merely establishes a desire for some form of capital punishment; it is hardly "utterly inconsistent with the notion that [those States] regarded mandatory capital sentencing as beyond 'evolving standards of decency.'" *Ibid.* It says no more about contemporary values than would the decision of a State, thinking itself faced with a choice between a barbarous punishment and no punishment at all, to choose the former.

> proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes." Report of the Special Commission For the Improvement of the Administration of Justice, North Carolina, Popular Government 13 (Jan. 1949).

The 1949 session of the General Assembly of North Carolina adopted the proposed modifications of its rape and murder statutes. Although in subsequent years numerous bills were introduced in the legislature to limit further or abolish the death penalty in North Carolina, they were rejected as were two 1969 proposals to return to mandatory death sentences for all capital offenses. See *State* v. *Waddell,* 282 N. C., at 441, 194 S. E. 2d, at 26 (opinion of the court); *id.,* at 456–457, 194 S. E. 2d, at 32–33 (Bobbitt, C. J., concurring in part and dissenting in part).

As noted, *supra,* at 285–286, when the Supreme Court of North Carolina analyzed the constitutionality of the State's death penalty statute following this Court's decision in *Furman,* it severed the 1949 proviso authorizing jury sentencing discretion and held that "the remainder of the statute with death as the mandatory punishment . . . remains in full force and effect." *State* v. *Waddell, supra,* at 444–445, 194 S. E. 2d, at 28. The North Carolina General Assembly then followed the course found constitutional in *Waddell* and enacted a first-degree murder provision identical to the mandatory statute in operation prior to the authorization of jury discretion. The State's brief in this case relates that the legislature sought to remove "*all* sentencing discretion [so that] there could be no successful *Furman* based attack on the North Carolina statute."

It is now well established that the Eighth Amendment draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S., at 101 (plurality opinion). As the above discussion makes clear, one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish "be exercised within the limits of civilized standards." *Id.*, at 100.[36]

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[36] Dissenting opinions in this case and in *Roberts* v. *Louisiana*, *post*, p. 325, argue that this conclusion is "simply mistaken" because the American rejection of mandatory death sentence statutes might possibly be ascribable to "some maverick juries or jurors." *Post*, at 309, 313 (REHNQUIST, J., dissenting). See *Roberts* v. *Louisiana*, *post*, at 361 (WHITE, J., dissenting). Since acquittals no less than convictions required unanimity and citizens with moral reservations concerning the death penalty were regularly excluded from capital juries, it seems hardly conceivable that the persistent refusal of American juries to convict palpably guilty defendants of capital offenses under mandatory death sentence statutes merely "represented the intransigence of only a small minority" of jurors. *Post*, at 312 (REHNQUIST, J., dissenting). Moreover, the dissenting opinions simply ignore the experience under discretionary death sentence statutes indicating that juries reflecting contemporary community values, *Witherspoon* v. *Illinois*, 391 U. S., at 519, and n. 15, found the death penalty appropriate for only a small minority of convicted first-degree murderers. See n. 31, *supra*. We think it evident that the uniform assessment of the historical record by Members of this Court beginning in 1899 in *Winston* v. *United States*, 172 U. S. 303 (1899), and continuing through the dissenting opin-

B

A separate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments. See *Furman* v. *Georgia*, 408 U. S., at 309–310 (STEWART, J., concurring); *id.*, at 313 (WHITE, J., concurring); cf. *id.*, at 253–257 (Douglas, J., concurring). See also *id.*, at 398–399 (BURGER, C. J., dissenting). It is argued that North Carolina has remedied the inadequacies of the death penalty statutes held unconstitutional in *Furman* by withdrawing all sentencing discretion from juries in capital cases. But when one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.

As we have noted in Part III–A, *supra*, there is general agreement that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes. The North Carolina study commission, *supra*, at 299–300, reported that juries in that State "[q]uite frequently" were deterred from rendering guilty verdicts of first-degree murder because of the enormity of the sentence automatically imposed. Moreover,

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ions of THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN four years ago in *Furman*, see *supra*, at 296–298, and n. 32, provides a far more cogent and persuasive explanation of the American rejection of mandatory death sentences than do the speculations in today's dissenting opinions.

as a matter of historic fact, juries operating under discretionary sentencing statutes have consistently returned death sentences in only a minority of first-degree murder cases.[37] In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences.[38] Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly. While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.

C

A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In *Furman,* members of the Court acknowledged what cannot fairly be denied—that death is a punishment different from all other

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[37] See n. 31, *supra.*

[38] See *Gregg* v. *Georgia, ante,* at 204–206.

sanctions in kind rather than degree. See 408 U. S., at 286–291 (BRENNAN, J., concurring); *id.*, at 306 (STEWART, J., concurring). A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

This Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See *Williams* v. *New York*, 337 U. S., at 247–249; *Furman* v. *Georgia*, 408 U. S., at 402–403 (BURGER, C. J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop* v. *Dulles*, 356 U. S., at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[39]

For the reasons stated, we conclude that the death sentences imposed upon the petitioners under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside.[40] The judgment of the Supreme Court of North Carolina is reversed insofar as it upheld the death sentences imposed upon the petitioners, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BRENNAN, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 227, I concur in the judgment

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[39] MR. JUSTICE REHNQUIST's dissenting opinion proceeds on the faulty premise that if, as we hold in *Gregg* v. *Georgia, ante,* p. 153, the penalty of death is not invariably a cruel and unusual punishment for the crime of murder, then it must be a proportionate and appropriate punishment for any and every murderer regardless of the circumstances of the crime and the character and record of the offender. See *post,* at 322–324.

[40] Our determination that the death sentences in this case were imposed under procedures that violated constitutional standards makes it unnecessary to reach the question whether imposition of the death penalty on petitioner Woodson would have been so disproportionate to the nature of his involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia, ante,* at 187.

that sets aside the death sentences imposed under the North Carolina death sentence statute as violative of the Eighth and Fourteenth Amendments.

MR. JUSTICE MARSHALL, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 231, I am of the view that the death penalty is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. I therefore concur in the Court's judgment.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Following *Furman* v. *Georgia,* 408 U. S. 238 (1972), the North Carolina Supreme Court considered the effect of that case on the North Carolina criminal statutes which imposed the death penalty for first-degree murder and other crimes but which provided that "if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." *State* v. *Waddell,* 282 N. C. 431, 194 S. E. 2d 19 (1973), determined that *Furman* v. *Georgia* invalidated only the proviso giving the jury the power to limit the penalty to life imprisonment and that thenceforward death was the mandatory penalty for the specified capital crimes. Thereafter N. C. Gen. Stat. § 14–17 was amended to eliminate the express dispensing power of the jury and to add kidnaping to the underlying felonies for which death is the specified penalty. As amended in 1974, the section reads as follows:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed

> in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

It was under this statute that the petitioners in this case were convicted of first-degree murder and the mandatory death sentences imposed.

The facts of record and the proceedings in this case leading to petitioners' convictions for first-degree murder and their death sentences appear in the opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS. The issues in the case are very similar, if not identical, to those in *Roberts* v. *Louisiana, post,* p. 325. For the reasons stated in my dissenting opinion in that case, I reject petitioners' arguments that the death penalty in any circumstances is a violation of the Eighth Amendment and that the North Carolina statute, although making the imposition of the death penalty mandatory upon proof of guilt and a verdict of first-degree murder, will nevertheless result in the death penalty being imposed so seldom and arbitrarily that it is void under *Furman* v. *Georgia.* As is also apparent from my dissenting opinion in *Roberts* v. *Louisiana,* I also disagree with the two additional grounds which the plurality *sua sponte* offers for invalidating the North Carolina statute. I would affirm the judgment of the North Carolina Supreme Court.

MR. JUSTICE BLACKMUN, dissenting.

I dissent for the reasons set forth in my dissent in *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (1972), and

in the other dissenting opinions I joined in that case. *Id.*, at 375, 414, and 465.

MR. JUSTICE REHNQUIST, dissenting.

I

The difficulties which attend the plurality's explanation for the result it reaches tend at first to obscure difficulties at least as significant which inhere in the unarticulated premises necessarily underlying that explanation. I advert to the latter only briefly, in order to devote the major and following portion of this dissent to those issues which the plurality actually considers.

As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment, and made applicable to the States by the Fourteenth Amendment, *Robinson* v. *California*, 370 U. S. 660 (1962), was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights. *McGautha* v. *California*, 402 U. S. 183, 225 (1971) (opinion of Black, J.). If *Weems* v. *United States*, 217 U. S. 349 (1910), dealing not with the Eighth Amendment but with an identical provision contained in the Philippine Constitution, and the plurality opinion in *Trop* v. *Dulles*, 356 U. S. 86 (1958), are to be taken as indicating the contrary, they should surely be weighed against statements in cases such as *Wilkerson* v. *Utah*, 99 U. S. 130 (1879); *In re Kemmler*, 136 U. S. 436 (1890); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947), and the plurality opinion in *Trop* itself, that the infliction of capital punishment is not in itself violative of the Cruel and Unusual Punishments Clause. Thus for the plurality to begin its analysis with the assumption that it need only demonstrate that "evolving standards of decency" show that contemporary "so-

ciety" has rejected such provisions is itself a somewhat shaky point of departure. But even if the assumption be conceded, the plurality opinion's analysis nonetheless founders.

The plurality relies first upon its conclusion that society has turned away from the mandatory imposition of death sentences, and second upon its conclusion that the North Carolina system has "simply papered over" the problem of unbridled jury discretion which two of the separate opinions in *Furman* v. *Georgia*, 408 U. S. 238 (1972), identified as the basis for the judgment rendering the death sentences there reviewed unconstitutional. The third "constitutional shortcoming" of the North Carolina statute is said to be "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Ante*, at 303.

I do not believe that any one of these reasons singly, or all of them together, can withstand careful analysis. Contrary to the plurality's assertions, they would import into the Cruel and Unusual Punishments Clause procedural requirements which find no support in our cases. Their application will result in the invalidation of a death sentence imposed upon a defendant convicted of first-degree murder under the North Carolina system, and the upholding of the same sentence imposed on an identical defendant convicted on identical evidence of first-degree murder under the Florida, Georgia, or Texas systems—a result surely as "freakish" as that condemned in the separate opinions in *Furman*.

## II

The plurality is simply mistaken in its assertion that "[t]he history of mandatory death penalty statutes in the United States thus reveals that the practice of sen-

tencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid." *Ante*, at 292–293. This conclusion is purportedly based on two historic developments: the first a series of legislative decisions during the 19th century narrowing the class of offenses punishable by death; the second a series of legislative decisions during both the 19th and 20th centuries, through which mandatory imposition of the death penalty largely gave way to jury discretion in deciding whether or not to impose this ultimate sanction. The first development may have some relevance to the plurality's argument in general but has no bearing at all upon this case. The second development, properly analyzed, has virtually no relevance even to the plurality's argument.

There can be no question that the legislative and other materials discussed in the plurality's opinion show a widespread conclusion on the part of state legislatures during the 19th century that the penalty of death was being required for too broad a range of crimes, and that these legislatures proceeded to narrow the range of crimes for which such penalty could be imposed. If this case involved the imposition of the death penalty for an offense such as burglary or sodomy, see *ante*, at 289, the virtually unanimous trend in the legislatures of the States to exclude such offenders from liability for capital punishment might bear on the plurality's Eighth Amendment argument. But petitioners were convicted of first-degree murder, and there is not the slightest suggestion in the material relied upon by the plurality that there had been any turning away at all, much less any such unanimous turning away, from the death penalty as a punishment for those guilty of first-degree murder. The legislative narrowing of the spectrum of capital crimes, therefore, while very arguably representing a general societal judgment since the trend was so widespread, simply never

reached far enough to exclude the sort of aggravated homicide of which petitioners stand convicted.

The second string to the plurality's analytical bow is that legislative change from mandatory to discretionary imposition of the death sentence likewise evidences societal rejection of mandatory death penalties. The plurality simply does not make out this part of its case, however, in large part because it treats as being of equal dignity with legislative judgments the judgments of particular juries and of individual jurors.

There was undoubted dissatisfaction, from more than one sector of 19th century society, with the operation of mandatory death sentences. One segment of that society was totally opposed to capital punishment, and was apparently willing to accept the substitution of discretionary imposition of that penalty for its mandatory imposition as a halfway house on the road to total abolition. Another segment was equally unhappy with the operation of the mandatory system, but for an entirely different reason. As the plurality recognizes, this second segment of society was unhappy with the operation of the mandatory system, not because of the death sentences imposed under it, but because people obviously guilty of criminal offenses were *not* being convicted under it. See *ante*, at 293. Change to a discretionary system was accepted by these persons not because they thought mandatory imposition of the death penalty was cruel and unusual, but because they thought that if jurors were permitted to return a sentence other than death upon the conviction of a capital crime, fewer guilty defendants would be acquitted. See *McGautha*, 402 U. S., at 199.

So far as the action of juries is concerned, the fact that in some cases juries operating under the mandatory system refused to convict obviously guilty defendants does not reflect any "turning away" from the death penalty, or the mandatory death penalty, supporting the

proposition that it is "cruel and unusual." Given the requirement of unanimity with respect to jury verdicts in capital cases, a requirement which prevails today in States which accept a nonunanimous verdict in the case of other crimes, see *Johnson* v. *Louisiana*, 406 U. S. 356, 363–364 (1972), it is apparent that a single juror could prevent a jury from returning a verdict of conviction. Occasional refusals to convict, therefore, may just as easily have represented the intransigence of only a small minority of 12 jurors as well as the unanimous judgment of all 12. The fact that the presence of such jurors could prevent conviction in a given case, even though the majority of society, speaking through legislatures, had decreed that it should be imposed, certainly does not indicate that society as a whole rejected mandatory punishment for such offenders; it does not even indicate that those few members of society who serve on juries, as a whole, had done so.

The introduction of discretionary sentencing likewise creates no inference that contemporary society had rejected the mandatory system as unduly severe. Legislatures enacting discretionary sentencing statutes had no reason to think that there would not be roughly the same number of capital convictions under the new system as under the old. The same subjective juror responses which resulted in juror nullification under the old system were legitimized, but in the absence of those subjective responses to a particular set of facts, a capital sentence could as likely be anticipated under the discretionary system as under the mandatory. And at least some of those who would have been acquitted under the mandatory system would be subjected to at least *some* punishment under the discretionary system, rather than escaping altogether a penalty for the crime of which they were guilty. That society was unwilling to accept the

paradox presented to it by the actions of some maverick juries or jurors—the acquittal of palpably guilty defendants—hardly reflects the sort of an "evolving standard of decency" to which the plurality professes obeisance.

Nor do the opinions in *Furman* which indicate a preference for discretionary sentencing in capital cases suggest in the slightest that a mandatory sentencing procedure would be cruel and unusual. The plurality concedes, as it must, that following *Furman* 10 States enacted laws providing for mandatory capital punishment. See State Capital Punishment Statutes Enacted Subsequent to *Furman* v. *Georgia,* Congressional Research Service Pamphlet 17–22 (June 19, 1974). These enactments the plurality seeks to explain as due to a wrongheaded reading of the holding in *Furman.* But this explanation simply does not wash. While those States may be presumed to have preferred their prior systems reposing sentencing discretion in juries or judges, they indisputably preferred mandatory capital punishment to no capital punishment at all. Their willingness to enact statutes providing that penalty is utterly inconsistent with the notion that they regarded mandatory capital sentencing as beyond "evolving standards of decency." The plurality's glib rejection of *these* legislative decisions as having little weight on the scale which it finds in the Eighth Amendment seems to me more an instance of its desire to save the people from themselves than a conscientious effort to ascertain the content of any "evolving standard of decency."

## III

The second constitutional flaw which the plurality finds in North Carolina's mandatory system is that it has simply "papered over" the problem of unchecked

jury discretion. The plurality states, *ante*, at 302, that "there is general agreement that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes." The plurality also states, *ante*, at 303, that "as a matter of historic fact, juries operating under discretionary sentencing statutes have consistently returned death sentences in only a minority of first degree murder cases." The basic factual assumption of the plurality seems to be that for any given number of first-degree murder defendants subject to capital punishment, there will be a certain number of jurors who will be unwilling to impose the death penalty even though they are entirely satisfied that the necessary elements of the substantive offense are made out.

In North Carolina jurors unwilling to impose the death penalty may simply hang a jury or they may so assert themselves that a verdict of not guilty is brought in; in Louisiana they will have a similar effect in causing some juries to bring in a verdict of guilty of a lesser included offense even though all the jurors are satisfied that the elements of the greater offense are made out. Such jurors, of course, are violating their oath, but such violation is not only consistent with the majority's hypothesis; the majority's hypothesis is bottomed on its occurrence.

For purposes of argument, I accept the plurality's hypothesis; but it seems to me impossible to conclude from it that a mandatory death sentence statute such as North Carolina enacted is any less sound constitutionally than are the systems enacted by Georgia, Florida, and Texas which the Court upholds.

In Georgia juries are entitled to return a sentence of life, rather than death, for no reason whatever, simply

based upon their own subjective notions of what is right and what is wrong. In Florida the judge and jury are required to weigh legislatively enacted aggravating factors against legislatively enacted mitigating factors, and then base their choice between life or death on an estimate of the result of that weighing. Substantial discretion exists here, too, though it is somewhat more canalized than it is in Georgia. Why these types of discretion are regarded by the plurality as constitutionally permissible, while that which may occur in the North Carolina system is not, is not readily apparent. The freakish and arbitrary nature of the death penalty described in the separate concurring opinions of JUSTICES STEWART and WHITE in *Furman* arose not from the perception that so *many* capital sentences were being imposed but from the perception that so *few* were being imposed. To conclude that the North Carolina system is bad because juror nullification may permit jury discretion while concluding that the Georgia and Florida systems are sound because they *require* this same discretion, is, as the plurality opinion demonstrates, inexplicable.

The Texas system much more closely approximates the mandatory North Carolina system which is struck down today. The jury is required to answer three statutory questions. If the questions are unanimously answered in the affirmative, the death penalty *must* be imposed. It is extremely difficult to see how this system can be any less subject to the infirmities caused by juror nullification which the plurality concludes are fatal to North Carolina's statute. JUSTICES STEWART, POWELL, and STEVENS apparently think they can sidestep this inconsistency because of their belief that one of the three questions will permit consideration of mitigating factors justifying imposition of a life sentence. It is, however, as those Justices recognize, *Jurek* v. *Texas*, *ante*, at 272–

273, far from clear that the statute is to be read in such a fashion. In any event, while the imposition of such unlimited consideration of mitigating factors may conform to the plurality's novel constitutional doctrine that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," *ante*, at 271, the resulting system seems as likely as any to produce the unbridled discretion which was condemned by the separate opinions in *Furman*.

The plurality seems to believe, see *ante*, at 303, that provision for appellate review will afford a check upon the instances of juror arbitrariness in a discretionary system. But it is not at all apparent that appellate review of death sentences, through a process of comparing the facts of one case in which a death sentence was imposed with the facts of another in which such a sentence was imposed, will afford any meaningful protection against whatever arbitrariness results from jury discretion. All that such review of death sentences can provide is a comparison of fact situations which must in their nature be highly particularized if not unique, and the only relief which it can afford is to single out the occasional death sentence which in the view of the reviewing court does not conform to the standards established by the legislature.

It is established, of course, that there is no right to appellate review of a criminal sentence. *McKane* v. *Durston*, 153 U. S. 684 (1894). That question is not at issue here, since North Carolina, along with the other four States whose systems the petitioners are challenging in these cases, provides appellate review for a death sentence imposed in one of its trial courts.

By definition, of course, there can be no separate appellate review of the factual basis for the sentencing decision

in a mandatory system. If it is once established in a fairly conducted trial that the defendant has in fact committed the crime in question, the only question as to the sentence which can be raised on appeal is whether a legislative determination that such a crime should be punished by death violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. Here both petitioners were convicted of first-degree murder, and there is no serious question raised by the plurality that death is not a constitutionally permissible penalty for such a crime.

But the plurality sees another role for appellate review in its description of the reasons why the Georgia, Texas, and Florida systems are upheld, and the North Carolina system struck down. And it is doubtless true that Georgia in particular has made a substantial effort to respond to the concerns expressed in *Furman*, not an easy task considering the glossolalial manner in which those concerns were expressed. The Georgia Supreme Court has indicated that the Georgia death penalty statute requires it to review death sentences imposed by juries on the basis of rough "proportionality." It has announced that it will not sustain, at least at the present time, death penalties imposed for armed robbery because that penalty is so seldom imposed by juries for that offense. It has also indicated that it will not sustain death penalties imposed for rape in certain fact situations, because the death penalty has been so seldom imposed on facts similar to those situations.

But while the Georgia response may be an admirable one as a matter of policy, it has imperfections, if a failure to conform completely to the dictates of the separate opinions in *Furman* be deemed imperfections, which the opinion of JUSTICES STEWART, POWELL, and STEVENS does not point out. Although there may be some disagree-

ment between that opinion, and the opinion of my Brother WHITE in *Gregg* v. *Georgia*, which I have joined, as to whether the proportionality review conducted by the Supreme Court of Georgia is based solely upon capital sentences imposed, or upon all sentences imposed in cases where a capital sentence could have been imposed by law, I shall assume for the purposes of this discussion that the system contemplates the latter. But this is still far from a guarantee of any equality in sentencing, and is likewise no guarantee against juror nullification. Under the Georgia system, the jury is free to recommend life imprisonment, as opposed to death, for no stated reason whatever. The Georgia Supreme Court cannot know, therefore, when it is reviewing jury sentences for life in capital cases, whether the jurors found aggravating circumstances present, but nonetheless decided to recommend mercy, or instead found no aggravating circumstances at all and opted for mercy. So the "proportionality" type of review, while it would perhaps achieve its objective if there were no possible factual lacunae in the jury verdicts, will not achieve its objective because there are necessarily such lacunae.

Identical defects seem inherent in the systems of appellate review provided in Texas and Florida, for neither requires the sentencing authority which concludes that a death penalty is inappropriate to state what mitigating factors were found to be present or whether certain aggravating factors urged by the prosecutor were actually found to be lacking. Without such detailed factual findings JUSTICES STEWART, POWELL, and STEVENS' praise of appellate review as a cure for the constitutional infirmities which they identify seems to me somewhat forced.

Appellate review affords no correction whatever with respect to those fortunate few who are the beneficiaries

of random discretion exercised by juries, whether under an admittedly discretionary system or under a purportedly mandatory system. It may make corrections at one end of the spectrum, but cannot at the other. It is even less clear that any provision of the Constitution can be read to require such appellate review. If the States wish to undertake such an effort, they are undoubtedly free to do so, but surely it is not required by the United States Constitution.

The plurality's insistence on "standards" to "guide the jury in its inevitable exercise of the power to determine which . . . murderers shall live and which shall die" is squarely contrary to the Court's opinion in *McGautha* v. *California*, 402 U. S. 183 (1971), written by Mr. Justice Harlan and subscribed to by five other Members of the Court only five years ago. So is the plurality's latter-day recognition, some four years after the decision of the case, that *Furman* requires "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Its abandonment of *stare decisis* in this repudiation of *McGautha* is a far lesser mistake than its substitution of a superficial and contrived constitutional doctrine for the genuine wisdom contained in *McGautha*. There the Court addressed the "standardless discretion" contention in this language:

> "In our view, such force as this argument has derives largely from its generality. Those who have come to grips with the hard task of actually attempting to draft means for channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characterstics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language

which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

"Thus the British Home Office, which before the recent abolition of capital punishment in that country had the responsibility for selecting the cases from England and Wales which should receive the benefit of the Royal Prerogative of Mercy, observed:

" 'The difficulty of defining by any statutory provision the types of murder which ought or ought not to be punished by death may be illustrated by reference to the many diverse considerations to which the Home Secretary has regard in deciding whether to recommend clemency. No simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion.' 1–2 Royal Commission on Capital Punishment, Minutes of Evidence 13 (1949)." 402 U. S., at 204–205.

. . . . .

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of cir-

> cumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need." *Id.*, at 207–208 (citation omitted).

It is also worth noting that the plurality opinion repudiates not only the view expressed by the Court in *McGautha*, but also, as noted in *McGautha*, the view which had been adhered to by every other American jurisdiction which had considered the question. See *id.*, at 196 n. 8.

## IV

The plurality opinion's insistence, in Part III–C, that if the death penalty is to be imposed there must be "particularized consideration of relevant aspects of the character and record of each convicted defendant" is buttressed by neither case authority nor reason. Its principal claim to distinction is that it contradicts important parts of Part III–A in the same opinion.

Part III–A, which describes what it conceives to have been society's turning away from the mandatory imposition of the death penalty, purports to express no opinion as to the constitutionality of a mandatory statute for "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence." See *ante*, at 287 n. 7. Yet if "particularized consideration" is to be required in every case under the doctrine expressed in Part III–C, such a reservation in Part III–A is disingenuous at best.

None of the cases half-heartedly cited by the plurality in Part III–C comes within a light-year of establishing the proposition that individualized consideration is a constitutional requisite for the imposition of the death penalty. *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51 (1937), upheld against a claim of violation of

the Equal Protection Clause a Pennsylvania statute which made the sentence imposed upon a convict breaking out of a penitentiary dependent upon the length of the term which he was serving at the time of the break. In support of its conclusion that Pennsylvania had not denied the convict equal protection, the Court observed:

> "The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the State's] determination. . . . It may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes. For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him." *Id.*, at 55.

These words of Mr. Justice Butler, speaking for the Court in that case, and those of Mr. Justice Black in *Williams* v. *New York*, 337 U. S. 241 (1949), the other opinion relied on by the plurality, lend no support whatever to the principle that the Constitution requires individualized consideration. This is not surprising, since even if such a doctrine had respectable support, which it has not, it is unlikely that either Mr. Justice Butler or Mr. Justice Black would have embraced it.

The plurality also relies upon the indisputable proposition that "death is different" for the result which it reaches in Part III–C. But the respects in which death is "different" from other punishment which may be im-

posed upon convicted criminals do not seem to me to establish the proposition that the Constitution requires individualized sentencing.

One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life. This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for especially careful review of the fairness of the trial, the accuracy of the factfinding process, and the fairness of the sentencing procedure where the death penalty is imposed. But none of those aspects of the death sentence is at issue here. Petitioners were found guilty of the crime of first-degree murder in a trial the constitutional validity of which is unquestioned here. And since the punishment of death is conceded by the plurality not to be a cruel and unusual punishment for such a crime, the irreversible aspect of the death penalty has no connection whatever with any requirement for individualized consideration of the sentence.

The second aspect of the death penalty which makes it "different" from other penalties is the fact that it is indeed an ultimate penalty, which ends a human life rather than simply requiring that a living human being be confined for a given period of time in a penal institution. This aspect of the difference may enter into the decision of whether or not it is a "cruel and unusual" penalty for a given offense. But since in this case the offense was first-degree murder, that particular inquiry need proceed no further.

The plurality's insistence on individualized consideration of the sentencing, therefore, does not depend upon any traditional application of the prohibition against cruel and unusual punishment contained in the Eighth Amendment. The punishment here is concededly not

cruel and unusual, and that determination has traditionally ended judicial inquiry in our cases construing the Cruel and Unusual Punishments Clause. *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Robinson* v. *California*, 370 U. S. 660 (1962); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947); *Wilkerson* v. *Utah*, 99 U. S. 130 (1879). What the plurality opinion has actually done is to import into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant was convicted, is to be imposed. This is squarely contrary to *McGautha*, and unsupported by any other decision of this Court.

I agree with the conclusion of the plurality, and with that of MR. JUSTICE WHITE, that death is not a cruel and unusual punishment for the offense of which these petitioners were convicted. Since no member of the Court suggests that the trial which led to those convictions in any way fell short of the standards mandated by the Constitution, the judgments of conviction should be affirmed. The Fourteenth Amendment, giving the fullest scope to its "majestic generalities," *Fay* v. *New York*, 332 U. S. 261, 282 (1947), is conscripted rather than interpreted when used to permit one but not another system for imposition of the death penalty.

Syllabus

# ROBERTS *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 75–5844. Argued March 30–31, 1976—Decided July 2, 1976

Petitioner was found guilty of first-degree murder and sentenced to death under amended Louisiana statutes enacted after this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238. The Louisiana Supreme Court affirmed, rejecting petitioner's contention that the new procedure for imposing the death penalty is unconstitutional. The post-*Furman* legislation mandates imposition of the death penalty whenever, with respect to five categories of homicide (here killing during the perpetration of an armed robbery), the jury finds the defendant had a specific intent to kill or to inflict great bodily harm. If a verdict of guilty of first-degree murder is returned, death is mandated regardless of any mercy recommendation. Every jury is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if no evidence supports the lesser verdicts; and if a lesser verdict is returned it is treated as an acquittal of all greater charges. *Held:* The judgment is reversed insofar as it upheld the death sentence, and the case is remanded. Pp. 331–336; 336; 336–337.

319 So. 2d 317, reversed and remanded.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS concluded that:

1. The imposition of the death penalty is not *per se* cruel and unusual punishment violative of the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia, ante*, at 168–187. P. 331.

2. Louisiana's mandatory death penalty statute violates the Eighth and Fourteenth Amendments. Pp. 331–336.

(a) Though Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina, the difference is not of constitutional significance, and the Louisiana statute imposing a mandatory death sentence is invalid for substantially the same reasons as are detailed in *Woodson* v. *North Carolina, ante*, at 289–296. Pp. 331–334.

(b) Though respondent State claims that it has adopted satisfactory procedures to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safe-

guard against the arbitrary and capricious imposition of death sentences, that objective has not been realized, since the responsive-verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel that the death penalty is inappropriate. See *Woodson, ante,* at 302–303. Pp. 334–336.

MR. JUSTICE BRENNAN concurred in the judgment for the reasons stated in his dissenting opinion in *Gregg* v. *Georgia, ante,* p. 227. P. 336.

MR. JUSTICE MARSHALL, being of the view that death is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, concurred in the judgment. *Gregg* v. *Georgia, ante,* p. 231 (MARSHALL, J., dissenting). P. 336.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by STEVENS, J. BRENNAN, J., *post,* p. 336, and MARSHALL, J., *post,* p. 336, filed statements concurring in the judgment. BURGER, C. J., filed a dissenting statement, *post,* p. 337. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, and REHNQUIST, JJ., joined, *post,* p. 337. BLACKMUN, J., filed a dissenting statement, *post,* p. 363.

*Anthony G. Amsterdam* argued the cause for petitioner. With him on the brief were *Jack Greenberg, James M. Nabrit III, Peggy C. Davis, James E. Williams,* and *Richard P. Ieyoub.*

*James L. Babin* argued the cause for respondent. With him on the brief were *William J. Guste, Jr.,* Attorney General of Louisiana, *Walter L. Smith* and *L. J. Hymel, Jr.,* Assistant Attorneys General, and *Frank T. Salter, Jr.*

*Solicitor General Bork* argued the cause for the United States as *amicus curiae.* With him on the brief was *Deputy Solicitor General Randolph. William E. James,* Assistant Attorney General, argued the cause for the State of California as *amicus curiae.* With him on the

brief were *Evelle J. Younger,* Attorney General, and *Jack R. Winkler,* Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEVENS.

The question in this case is whether the imposition of the sentence of death for the crime of first-degree murder under the law of Louisiana violates the Eighth and Fourteenth Amendments.

I

On August 18, 1973, in the early hours of the morning, Richard G. Lowe was found dead in the office of the Lake Charles, La., gas station where he worked. He had been shot four times in the head. Four men—the petitioner, Huey Cormier, Everett Walls, and Calvin Arceneaux—were arrested for complicity in the murder. The petitioner was subsequently indicted by a grand jury on a presentment that he "[d]id unlawfully with the specific intent to kill or to inflict great bodily harm, while engaged in the armed robbery of Richard G. Lowe, commit first degree murder by killing one Richard G. Lowe, in violation of Section One (1) of LSA–R. S. 14:30."

At the petitioner's trial, Cormier, Walls, and Arceneaux testified for the prosecution. Their testimony established that just before midnight on August 17, the petitioner discussed with Walls and Cormier the subject of "ripping off that old man at the station," and that on the early morning of August 18, Arceneaux and the petitioner went to the gas station on the pretext of seeking employment. After Lowe told them that there were no jobs available they surreptitiously made their way into

**Arthur M. Michaelson* filed a brief for Amnesty International as *amicus curiae.*

the office of the station, where Arceneaux removed a pistol from a desk drawer. The petitioner insisted on taking possession of the pistol. When Lowe returned to the office, the petitioner and Arceneaux assaulted him and then shoved him into a small back room. Shortly thereafter a car drove up. Arceneaux went out and, posing as the station attendant, sold the motorist about three dollars' worth of gasoline. While still out in front, Arceneaux heard four shots from inside the station. He went back inside and found the petitioner gone and Lowe lying bleeding on the floor. Arceneaux grabbed some empty "money bags" and ran.

The jury found the petitioner guilty as charged. As required by state law, the trial judge sentenced him to death. The Supreme Court of Louisiana affirmed the judgment. 319 So. 2d 317 (1975). We granted certiorari, 423 U. S. 1082 (1976), to consider whether the imposition of the death penalty in this case violates the Eighth and Fourteenth Amendments of the United States Constitution.

## II

The Louisiana Legislature in 1973 amended the state statutes relating to murder and the death penalty in apparent response to this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Before these amendments, Louisiana law defined the crime of "murder" as the killing of a human being by an offender with a specific intent to kill or to inflict great bodily harm, or by an offender engaged in the perpetration or attempted perpetration of certain serious felonies, even without an intent to kill.[1] The jury was free to return any of four ver-

[1] La. Rev. Stat. Ann. § 14:30 (1951). The felonies were aggravated arson, aggravated burglary, aggravated kidnaping, aggravated rape, armed robbery, and simple robbery.

dicts: guilty, guilty without capital punishment, guilty of manslaughter, or not guilty.[2]

In the 1973 amendments, the legislature changed this discretionary statute to a wholly mandatory one, requiring that the death penalty be imposed whenever the jury finds the defendant guilty of the newly defined crime of first-degree murder. The revised statute, under which the petitioner was charged, convicted, and sentenced, provides in part that first-degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm *and* is engaged in the perpetration or attempted perpetration of aggravated kidnaping, aggravated rape, or armed robbery.[3] In a

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[2] La. Code Crim. Proc. Ann., Art. 814 (1967).

[3] La. Rev. Stat. Ann. § 14:30 (1974):

"*First degree murder*

"First degree murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or

"(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or

"(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

"(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]

"(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

"For the purposes of Paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge,

first-degree murder case, the four responsive verdicts are now guilty, guilty of second-degree murder, guilty of manslaughter, and not guilty. La. Code Crim. Proc. Ann., Art. 814 (A)(1) (Supp. 1975). The jury must be instructed on all these verdicts, whether or not raised by the evidence or requested by the defendant.[4]

Under the former statute, the jury had the unfettered choice in any case where it found the defendant guilty of murder of returning either a verdict of guilty, which required the imposition of the death penalty, or a verdict of guilty without capital punishment, in which case the punishment was imprisonment at hard labor for life.[5]

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district attorney, assistant district attorney or district attorneys' investigator.

"Whoever commits the crime of first degree murder shall be punished by death."

(In 1975, § 14:30 (1) was amended to add the crime of aggravated burglary as a predicate felony for first-degree murder. La. Acts 1975, No. 327, § 1.)

Louisiana Rev. Stat. Ann. § 14:30.1 (1974) provides:

"*Second degree murder*

"Second degree murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

"(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

"Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."

(In 1975, § 14:30.1 was amended to increase the period of parole ineligibility from 20 to 40 years following a conviction for second-degree murder. La. Acts 1975, No. 380.)

[4] See *State* v. *Cooley*, 260 La. 768, 257 So. 2d 400 (1972).

[5] Louisiana Code Crim. Proc. Ann., Art. 814 (1967), enumerated "guilty without capital punishment" as one of the responsive verdicts available in a murder case. Article 817 provided that the jury in a

Under the new statute the jury is required to determine only whether both conditions existed at the time of the killing; if there was a specific intent to kill or to inflict great bodily harm, and the offender was engaged in an armed robbery, the offense is first-degree murder and the mandatory punishment is death. If only one of these conditions existed, the offense is second-degree murder and the mandatory punishment is imprisonment at hard labor for life. Any qualification or recommendation which a jury might add to its verdict—such as a recommendation of mercy where the verdict is guilty of first-degree murder—is without any effect.[6]

## III

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg* v. *Georgia, ante,* at 168–187.

## IV

Louisiana, like North Carolina, has responded to *Furman* by replacing discretionary jury sentencing in capital cases with mandatory death sentences. Under the present Louisiana law, all persons found guilty of first-degree murder, aggravated rape, aggravated kidnaping, or treason are automatically sentenced to death. See La. Rev. Stat. Ann. §§ 14:30, 14:42, 14:44, 14:113 (1974).

There are two major differences between the Louisiana and North Carolina statutes governing first-degree murder cases. First, the crime of first-degree murder in North Carolina includes any willful, deliberate, and

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capital case could qualify its verdict of guilty with the phrase "without capital punishment."

[6] La. Code Crim. Proc. Ann., Art. 817 (Supp. 1975).

premeditated homicide and any felony murder, whereas Louisiana limits first-degree murder to five categories of homicide—killing in connection with the commission of certain felonies; killing of a fireman or a peace officer in the performance of his duties; killing for remuneration; killing with the intent to inflict harm on more than one person; and killing by a person with a prior murder conviction or under a current life sentence. Second, Louisiana employs a unique system of responsive verdicts under which the jury in every first-degree murder case must be instructed on the crimes of first-degree murder, second-degree murder, and manslaughter and must be provided with the verdicts of guilty, guilty of second-degree murder, guilty of manslaughter, and not guilty. See La. Code Crim. Proc. Ann., Arts. 809, 814 (Supp. 1975); *State* v. *Cooley*, 260 La. 768, 771, 257 So. 2d 400, 401 (1972). By contrast, in North Carolina instructions on lesser included offenses must have a basis in the evidence adduced at trial. See *State* v. *Spivey*, 151 N. C. 676, 65 S. E. 995 (1909); cf. *State* v. *Vestal*, 283 N. C. 249, 195 S. E. 2d 297 (1973).

That Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina is not of controlling constitutional significance. The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute. See *Woodson* v. *North Carolina*, *ante*, at 289–296. A large group of jurisdictions first responded to the unacceptable severity of the common-law rule of automatic death sentences for all murder convictions by narrowing the definition of capital homicide. Each of these juris-

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[7] See La. Rev. Stat. Ann. § 14:30 (1974), set forth at n. 3, *supra*.

dictions found that approach insufficient and subsequently substituted discretionary sentencing for mandatory death sentences. See *Woodson* v. *North Carolina, ante,* at 290–292.[8]

The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams* v. *New York,* 337 U. S. 241, 247 (1949). See also *Pennsylvania ex rel. Sullivan* v. *Ashe,* 302 U. S. 51, 55 (1937). As the dissenting Justices in *Furman* noted, the 19th century movement away from mandatory death sentences was rooted in the recognition that "individual culpability is not always measured by the category of crime committed." 408 U. S., at 402 (BURGER, C. J., joined by BLACKMUN, POWELL, and REHNQUIST, JJ., dissenting).

The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender—is not resolved by Louisiana's limitation of first-degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circum-

[8] At least 27 jurisdictions first limited the scope of their capital homicide laws by dividing murder into degrees and then later made death sentences discretionary even in first-degree murder cases.

stances of the particular crime or by the attributes of the individual offender.[9]

Louisiana's mandatory death sentence statute also fails to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. The State claims that it has adopted satisfactory procedures by taking all sentencing authority from juries in capital murder cases. This was accomplished, according to the State, by deleting the jury's pre-*Furman* authority to return a verdict of guilty without capital punishment in any murder case. See La. Rev. Stat. Ann. § 14:30 (1974); La. Code Crim. Proc. Ann., Arts. 814, 817 (Supp. 1975).[10]

Under the current Louisiana system, however, every jury in a first-degree murder case is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there is not a scintilla of evidence to support the lesser verdicts. See La. Code Crim. Proc. Ann., Arts. 809, 814 (Supp. 1975). And, if a lesser verdict is returned, it is treated as an acquittal of all greater charges. See La. Code Crim. Proc. Ann., Art. 598 (Supp. 1975). This responsive verdict

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[9] Only the third category of the Louisiana first-degree murder statute, covering intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law. See *Gregg* v. *Georgia*, *ante*, at 186; *Woodson* v. *North Carolina*, *ante*, at 287 n. 7, 292–293, n. 25.

[10] Louisiana juries are instructed to return a guilty verdict for the offense charged if warranted by the evidence and to consider lesser verdicts only if the evidence does not justify a conviction on the greater offense. See *State* v. *Hill*, 297 So. 2d 660, 662 (La. 1974); cf. *State* v. *Selman*, 300 So. 2d 467, 471–473 (La. 1974).

procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion. See *Woodson* v. *North Carolina, ante,* at 302–303.[11]

The Louisiana statute thus suffers from constitutional deficiencies similar to those identified in the North Carolina statute in *Woodson* v. *North Carolina, ante,* p. 280. As in North Carolina, there are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences, and there is no meaningful appellate review of the jury's

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[11] While it is likely that many juries will follow their instructions and consider only the question of guilt in reaching their verdict, it is only reasonable to assume, in light of past experience with mandatory death sentence statutes, that a significant number of juries will take into account the fact that the death sentence is an automatic consequence of any first-degree murder conviction in Louisiana. See *Woodson* v. *North Carolina, ante,* at 302–303. Those juries that do consider sentencing consequences are given no guidance in deciding when the ultimate sanction of death is an appropriate punishment and will often be given little or no evidence concerning the personal characteristics and previous record of an individual defendant. Moreover, there is no judicial review to safeguard against capricious sentencing determinations. Indeed, there is no judicial review of the sufficiency of the evidence to support a conviction. See *State* v. *Brumfield,* 319 So. 2d 402, 404 (La. 1975); *State* v. *Evans,* 317 So. 2d 168, 170 (La. 1975); *State* v. *Douglas,* 278 So. 2d 485, 491 (La. 1973).

decision. As in North Carolina, death sentences are mandatory upon conviction for first-degree murder. Louisiana's mandatory death sentence law employs a procedure that was rejected by that State's legislature 130 years ago [12] and that subsequently has been renounced by legislatures and juries in every jurisdiction in this Nation. See *Woodson* v. *North Carolina, ante,* at 291–296. The Eighth Amendment, which draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958) (plurality opinion), simply cannot tolerate the reintroduction of a practice so thoroughly discredited.

Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside. The judgment of the Supreme Court of Louisiana is reversed insofar as it upheld the death sentence imposed upon the petitioner, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BRENNAN, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 227, I concur in the judgment that sets aside the death sentence imposed under the Louisiana death sentence statute as violative of the Eighth and Fourteenth Amendments.

MR. JUSTICE MARSHALL, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 231, I am of the view that the death penalty is a cruel and unusual punishment for-

[12] See La. Laws 1846, c. 139.

bidden by the Eighth and Fourteenth Amendments. I therefore concur in the Court's judgment.

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent for the reasons set forth in my dissent in *Furman* v. *Georgia*, 408 U. S. 238, 375 (1972).

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

Under the Louisiana statutes in effect prior to 1973, there were three grades of criminal homicide—murder, manslaughter, and negligent homicide. La. Rev. Stat. Ann. § 14:29 (1951). Murder was punishable by death, La. Rev. Stat. Ann. § 14:30 (1951); but a jury finding a defendant guilty of murder was empowered to foreclose the death penalty by returning a verdict of "guilty without capital punishment." La. Rev. Stat. Ann. § 15:409 (1951). Following *Furman* v. *Georgia*, 408 U. S. 238 (1972), which the Louisiana Supreme Court held effectively to have invalidated the Louisiana death penalty,[1] the statutes were amended to provide four grades of criminal homicide: first-degree murder, second-degree murder, manslaughter, and negligent homicide. La. Rev. Stat. Ann. § 14:29 (1974 Supp.). First-degree murder was defined as the killing of a human in prescribed situations, including where the offender, with specific intent to kill or to inflict great bodily harm, takes another's life while per-

[1] *State* v. *Sinclair*, 263 La. 377, 268 So. 2d 514 (1972); *State* v. *Poland*, 263 La. 269, 268 So. 2d 221 (1972); *State* v. *Singleton*, 263 La. 267, 268 So. 2d 220 (1972); *State* v. *Williams*, 263 La. 284, 268 So. 2d 227 (1972); *State* v. *Square*, 263 La. 291, 268 So. 2d 229 (1972); *State* v. *Douglas*, 263 La. 294, 268 So. 2d 231 (1972); *State* v. *McAllister*, 263 La. 296, 268 So. 2d 231 (1972); *State* v. *Strong*, 263 La. 298, 268 So. 2d 232 (1972); *State* v. *Marks*, 263 La. 355, 268 So. 2d 253 (1972).

petrating or attempting to perpetrate aggravated kidnaping, aggravated rape, or armed robbery. La. Rev. Stat. Ann. § 14:30 (1974). The new statute provides that "whoever commits the crime of first degree murder shall be punished by death," and juries are no longer authorized to return guilty verdicts without capital punishment.[2] As had been the case before 1973, the possible

[2] Section 14:30 of La. Rev. Stat. Ann. (1974 Supp.), which became effective July 2, 1973, provided:

"First degree murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or

"(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or

"(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

"(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;

"(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

"For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.

"Whoever commits the crime of first degree murder shall be punished by death.

"Amended by Acts 1973, No. 109, § 1."

Subsection (1) of the the statute was amended in 1975 to include "aggravated burglary." La. Acts 1975, No. 327, § 1.

As petitioner here concedes, Louisiana's post-*Furman* legislation, *supra*, "narrowed" "the range of cases in which the punishment of death *might* be inflicted." Brief for Petitioner 31 (emphasis in original). Prior to the 1973 legislation, *all* murders were pun-

jury verdicts in first-degree murder cases are also specified by statute. As amended in 1973, these "responsive verdicts," as to which juries were to be instructed in every first-degree murder case, are: "guilty," "guilty of second degree murder," "guilty of manslaughter," and "not guilty." La. Code Crim. Proc., Art. 814 (A)(1) (Supp. 1975).

The issue in this case is whether the imposition of the death penalty under this statutory scheme upon a defendant found guilty of first-degree murder is consistent with the Eighth Amendment, which forbids the infliction of "cruel and unusual punishments" and which by virtue of the Fourteenth Amendment is binding upon the States. *Robinson* v. *California*, 370 U. S. 660 (1962). I am convinced that it is and dissent from the Court's judgment.

I

On August 18, 1973, Richard G. Lowe of Lake Charles, La., was found dead in the Texaco service station where

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ishable by the death penalty. Section 14:30, La. Rev. Stat. Ann. (1951), which was applicable prior to *Furman*, provided:

"Murder is the killing of a human being,

"(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

"(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

"Whoever commits the crime of murder shall be punished by death."

In addition to murder, Louisiana prior to *Furman* provided for the death penalty in cases of aggravated rape (§ 14:42), aggravated kidnaping (§ 14:44), and treason (§ 14:113). Louisiana's post-*Furman* legislation re-enacted the death penalty for aggravated rape (§ 14:42 (1975 Supp.)), aggravated kidnaping (§ 14:44 (1974 Supp.)), and treason (§ 14:113 (1974 Supp.)). The constitutionality of these statutes is not before the Court.

he worked as an attendant. He had been shot four times in the head with a pistol which was not found on the scene, but which, as it turned out, had been kept by the station manager in a drawer near the cash register. The gun was later recovered from the owner of a bar and was traced to petitioner, who was charged with first-degree murder in an indictment alleging that "with the specific intent to kill or to inflict great bodily harm" and "while engaged in . . . armed robbery," he had killed Richard G. Lowe.

At the trial Calvin Arceneaux, testifying for the prosecution, stated that he had participated in the robbery and that he had taken the gun from the drawer and given it to petitioner, who had said he wanted it because he had "always wanted to kill a white dude." The attendant, who had been overpowered, remained inside the station with petitioner while Arceneaux, posing as the station attendant, went outside to tend a customer. According to Arceneaux, Lowe was shot during this interval. Another witness, Everett Walls, testified that he had declined to participate in the robbery but by chance had seen the petitioner at the station with a gun in his hand. According to a third witness, Huey Cormier, who also had refused petitioner's invitation to participate, petitioner had come to Cormier's house early on August 18 and had said that he "had just shot that old man . . . at the filling station." Record 134–135.

The case went to the jury under instructions advising the jury of the State's burden of proof and of the charge in the indictment that petitioner had killed another person with "specific intent to kill or to inflict great bodily harm and done when the accused was engaged in the perpetration of armed robbery." The elements which the State was required to prove beyond reasonable doubt were explained, including the elements of first-degree

murder and of armed robbery.[3] In accordance with the statute the court also explained the possible verdicts other than first-degree murder: "The law provides that

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[3] "There are certain facts that must be proved by the State to your satisfaction and beyond a reasonable doubt before you can return a verdict of guilty in this case.

"First, the State must prove that a crime was committed and that it was committed within the Parish of Calcasieu.

"Second, the State must prove that the alleged crime was committed by Stanislaus Roberts, the person named in the indictment, and on trial in this case.

"Third, the State must prove that Richard G. Lowe, the person named in the indictment as having been killed, was in fact killed.

"Fourth, the State must prove that the killing occurred while the defendant was engaged in an armed robbery.

"Fifth, the State must prove that the killing occurred on or about the date alleged in the indictment, although I charge you that it is not necessary that the State prove the exact date alleged in the indictment.

"Sixth, the State must prove that the offense committed was murder.

"First degree murder is defined in LSA–R. S. 14:30 as follows:

"'First degree murder is the killing of a human being:

"'(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; . . .'

"The indictment in this case charged Stanislaus Roberts under the statute. The State then, under this indictment, must prove that the killing was unlawful and done with a specific intent to kill or to inflict great bodily harm and done when the accused was engaged in the perpetration of armed robbery.

"Armed robbery is defined in LSA–R. S. 14:64 as follows:

"'Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.'

"Theft includes the taking of anything of value which belongs to another without his consent. An intent to deprive the other permanently of whatever may be the subject of the taking is essential.

"A 'dangerous weapon' is defined by the law of Louisiana as 'any

in a trial of murder in the first degree, if the jury is not convinced beyond a reasonable doubt that the accused is guilty of the crime of murder in the first degree, but is

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gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm.'

"The test of a dangerous weapon is not whether the weapon is inherently dangerous, but whether it is dangerous 'in the manner used.' Whether a dangerous weapon was used in this case is a question to be determined by the jury in considering: (1) whether a weapon was used; (2) the nature of a weapon if so used; (3) and the manner in which it may have been used; under the law and definition referred to above.

"An essential element of the crime of armed robbery is specific criminal intent, which is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

"The requisite intent may be established by direct or positive evidence, or it may be inferred from the acts or conduct of the defendant or from other facts or circumstances surrounding the alleged commission of the offense. You may consider the acts or conduct of the defendant prior to, at the time of, or after the alleged offense, as well as all other facts by which you might ascertain whether the accused intended to commit the offense charged.

"To constitute the crime of first degree murder, the offender must have a specific intent to kill or inflict great bodily harm, and this 'specific intent' must actually exist in the mind of the offender at the time of the killing. If a human being is killed, when the offender is charged under this statute, but at the time of the killing, the offender did not have a specific intent to kill or inflict great bodily harm, then, the killing could not be murder in the first degree, although it might be murder in the second degree, manslaughter, justifiable homicide or an accident. The specific intent to kill or to inflict great bodily harm not only must exist at the time of the killing, but it must also be felonious, that is, it must be wrong or without any just cause or excuse.

"I charge you that it is not necessary that this specific intent should have existed in the mind of the offender for any particular length of time before the killing in order to constitute the crime of murder. If the will accompanies the act, that is, if the specific

convinced beyond a reasonable doubt that he is guilty of murder in the second degree, it should render a verdict of guilty of murder in the second degree." The elements of second-degree murder and also of manslaughter were then explained, whereupon the court instructed:

> "If you should conclude that the defendant is not guilty of murder in the first degree, but you are convinced beyond a reasonable doubt that he is guilty of murder in the second degree it would be your duty to find that defendant guilty of murder in the second degree.
>
> "If you should conclude that the defendant is not guilty of murder in the first degree or murder in the second degree, but you are convinced beyond a reasonable doubt that he is guilty of manslaughter, it would then be your duty to find the defendant guilty of manslaughter.
>
> "If you should conclude that the defendant is not guilty of murder in the first degree, or murder in the second degree or manslaughter, it would then be your duty to find the defendant not guilty."

Finally, the court instructed the jury:

> "To summarize, you may return any one of the following verdicts:
>
> "1. Guilty as charged.
>
> "2. Guilty of second degree murder.
>
> "3. Guilty of manslaughter.
>
> "4. Not guilty.
>
> "Accordingly, I will now set forth the proper form

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intent to kill or to inflict great bodily [harm] actually exists in the mind of the offender at the moment of the killing, even though this specific intent was formed only a moment prior to the act itself which causes death, it would be as completely sufficient to make the act murder as if the intent had been formed on the previous day, an hour earlier, or any other time."

of each verdict that may be rendered, reminding you that only one verdict shall be rendered.

"If you are convinced beyond a reasonable doubt that the defendant is guilty of the offense charged, the form of your verdict should be: 'We, the jury, find the defendant guilty as charged.'

"If you are not convinced beyond a reasonable doubt that the defendant is guilty of murder in the first degree but you are convinced beyond a reasonable doubt that the defendant is guilty of murder in the second degree, the form of your verdict would be: 'We, the jury, find the defendant guilty of second degree murder.'

"If you are not convinced beyond a reasonable doubt that the defendant is guilty of murder in the first degree or murder in the second degree, but you are convinced beyond a reasonable doubt that the defendant is guilty of manslaughter, the form of your verdict would be: 'We, the jury, find the defendant guilty of manslaughter.'

"If you are not convinced that the defendant is guilty of murder in the first degree, murder in the second degree or manslaughter, the form of your verdict would be: 'We, the jury, find the defendant not guilty.' "

The jury found the defendant guilty of first-degree murder and the death sentence was imposed. On appeal, the conviction was affirmed, the Louisiana Supreme Court rejecting petitioner's challenge to the death penalty based on the Eighth Amendment. 319 So. 2d 317 (1975).

## II

Petitioner mounts a double attack on the death penalty imposed upon him: First, that the statute under which his sentence was imposed is too little different from

the provision at issue in *Furman* v. *Georgia* to escape the strictures of our decision in that case; second, that death is a cruel and unusual punishment for any crime committed by any defendant under any conditions, an argument presented in *Furman* and there rejected by four of the six Justices who addressed the issue. I disagree with both submissions.

I cannot conclude that the current Louisiana first-degree murder statute is insufficiently different from the statutes invalidated in *Furman*'s wake to avoid invalidation under that case. As I have already said, under prior Louisiana law, one of the permissible verdicts that a jury in any capital punishment case was authorized by statute and by its instructions to return was "guilty without capital punishment." Dispensing with the death penalty was expressly placed within the uncontrolled discretion of the jury and in no case involved a breach of its instructions or the controlling statute. A guilty verdict carrying capital punishment required a unanimous verdict; any juror, consistent with his instruction and whatever the evidence might be, was free to vote for a verdict of guilty without capital punishment, thereby, if he persevered, at least foreclosing a capital punishment verdict at that trial.

Under this or similar jury-sentencing arrangements which were in force in Louisiana, Georgia, and most other States that authorized capital punishment, the death penalty came to be imposed less and less frequently, so much so that in *Furman* v. *Georgia* the Court concluded that in practice criminal juries, exercising their lawful discretion, were imposing it so seldom and so freakishly and arbitrarily that it was no longer serving the legitimate ends of criminal justice and had come to be cruel and unusual punishment violative of the Eighth Amendment. It was in response to this judgment that Louisiana sought to

re-enact the death penalty as a constitutionally valid punishment by redefining the crime of first-degree murder and by making death the mandatory punishment for those found guilty of that crime.

To implement this aim, the present Louisiana law eliminated the "guilty without capital punishment" verdict. Jurors in first-degree murder cases are no longer instructed that they have discretion to withhold capital punishment. Their instructions now are to find the defendant guilty if they believe beyond a reasonable doubt that he committed the crime with which he is charged. A verdict of guilty carries a mandatory death sentence. In the present case, the jury was instructed as to the specific elements constituting the crime of felony murder which the indictment charged. They were also directed that if they believed beyond reasonable doubt that Roberts committed these acts, they were to return a verdict of guilty as charged in the indictment. The jury could not, if it believed the defendant had committed the crime, nevertheless dispense with the death penalty.

The difference between a jury's having and not having the lawful discretion to spare the life of the defendant is apparent and fundamental. It is undeniable that the unfettered discretion of the jury to save the defendant from death was a major contributing factor in the developments which led us to invalidate the death penalty in *Furman* v. *Georgia*. This factor Louisiana has now sought to eliminate by making the death penalty compulsory upon a verdict of guilty in first-degree murder cases. As I see it, we are now in no position to rule that the State's present law, having eliminated the overt discretionary power of juries, suffers from the same constitutional infirmities which led this Court to invalidate the Georgia death penalty statute in *Furman* v. *Georgia*.

Even so, petitioner submits that in every capital case the court is required to instruct the jury with respect to lesser included offenses and that the jury therefore has unlimited discretion to foreclose the death penalty by finding the defendant guilty of a lesser included offense for which capital punishment is not authorized. The difficulty with the argument is illustrated by the instructions in this case. The jury was not instructed that it could in its discretion convict of a lesser included offense. The jury's plain instructions, instead, were to return a verdict of guilty of murder as charged if it believed from the evidence that Roberts had committed the specific acts constituting the offense charged and defined by the court. Only if they did not believe Roberts had committed the acts charged in the indictment were the jurors free to consider whether he was guilty of the lesser included offense of second-degree murder, and only if they did not find beyond a reasonable doubt that Roberts was guilty of second-degree murder were they free to consider the offense of manslaughter. As the Supreme Court of Louisiana said in *State* v. *Hill,* 297 So. 2d 660, 662 (1974), and repeated in this case, 319 So. 2d, at 322, "the use of these lesser verdicts . . . is contingent upon the jury finding insufficient evidence to convict the defendant of first degree murder, with which he is charged." See also *State* v. *Selman,* 300 So. 2d 467, 473 (La. 1974), cert. pending, No. 74–6065.

It is true that the jury in this case, like juries in other capital cases in Louisiana and elsewhere, may violate its instructions and convict of a lesser included offense despite the evidence. But for constitutional purposes I am quite unwilling to equate the raw power of nullification with the unlimited discretion extended jurors under prior Louisiana statutes. In *McGautha* v. *California,* 402 U. S. 183 (1971), we rejected the argument that vesting

standardless sentencing discretion in the jury was unconstitutional under the Due Process Clause. In arriving at that judgment, we noted that the practice of jury sentencing had emerged from the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers," *id.*, at 198, and from the unsatisfactory experience with attempting to define the various grades of homicide and to specify those for which the death penalty was required. Vesting complete sentencing power in the jury was the upshot. The difficulties adverted to in *McGautha*, however, including that of jury nullification, are inadequate to require invalidation of the Louisiana felony-murder rule on the ground that jurors will so often and systematically refuse to follow their instructions that the administration of the death penalty under the current law will not be substantially different from that which obtained under prior statutes.

Nor am I convinced that the Louisiana death penalty for first-degree murder is substantially more vulnerable because the prosecutor is vested with discretion as to the selection and filing of charges, by the practice of plea bargaining or by the power of executive clemency. Petitioner argues that these characteristics of the criminal justice system in Louisiana, combined with the discretion arguably left to the jury as discussed above, insure that the death penalty will be as seldom and arbitrarily applied as it was under the predecessor statutes. The Louisiana statutes, however, define the elements of first-degree murder, and I cannot accept the assertion that state prosecutors will systematically fail to file first-degree murder charges when the evidence warrants it or to seek convictions for first-degree murder on less than adequate evidence. Of course, someone *must* exercise discretion and judgment as to what charges are to be filed and against whom; but this essential process is

nothing more than the rational enforcement of the State's criminal law and the sensible operation of the criminal justice system. The discretion with which Louisiana's prosecutors are invested and which appears to be no more than normal, furnishes no basis for inferring that capital crimes will be prosecuted so arbitrarily and infrequently that the present death penalty statute is invalid under *Furman* v. *Georgia*.

I have much the same reaction to plea bargaining and executive clemency. A prosecutor may seek or accept pleas to lesser offenses where he is not confident of his first-degree murder case, but this is merely the proper exercise of the prosecutor's discretion as I have already discussed. So too, as illustrated by this case and the North Carolina case, *Woodson* v. *North Carolina*, *ante*, p. 280, some defendants who otherwise would have been tried for first-degree murder, convicted, and sentenced to death are permitted to plead to lesser offenses because they are willing to testify against their codefendants. This is a grisly trade, but it is not irrational; for it is aimed at insuring the successful conclusion of a first-degree murder case against one or more other defendants. Whatever else the practice may be, it is neither inexplicable, freakish, nor violative of the Eighth Amendment. Nor has it been condemned by this Court under other provisions of the Constitution. *Santobello* v. *New York*, 404 U. S. 257 (1971); *North Carolina* v. *Alford*, 400 U. S. 25 (1970); *Parker* v. *North Carolina*, 397 U. S. 790 (1970); *Brady* v. *United States*, 397 U. S. 742 (1970). See also *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 30–31 (1973).

As for executive clemency, I cannot assume that this power, exercised by governors and vested in the President by Art. II, § 2, of the Constitution, will be used in a standardless and arbitrary manner. It is more reason-

able to expect the power to be exercised by the Executive Branch whenever it is concluded that the criminal justice system has unjustly convicted a defendant of first-degree murder and sentenced him to death. The country's experience with the commutation power does not suggest that it is a senseless lottery, that it operates in an arbitrary or discriminatory manner, or that it will lead to reducing the death penalty to a merely theoretical threat that is imposed only on the luckless few.

I cannot conclude, as do MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS (hereinafter the plurality), that under the present Louisiana law, capital punishment will occur so seldom, discriminatorily, or freakishly that it will fail to satisfy the Eighth Amendment as construed and applied in *Furman* v. *Georgia*.

## III

I also cannot agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment. The opposing positions on this issue, as well as the history of the death penalty, were fully canvassed by various Justices in their separate opinions in *Furman* v. *Georgia*, and these able and lucid presentations need not be repeated here. It is plain enough that the Constitution drafted by the Framers expressly made room for the death penalty. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." and that no person shall be "twice put in jeopardy of life or limb . . . nor be deprived of life . . . without due process of law." The Fourteenth Amendment, adopted three-quarters of a century later, likewise enjoined the States from depriving any person of "his life" without due process of law.

Since the very first Congress, federal law has defined crimes for which the death penalty is authorized. Capital punishment has also been part of the criminal justice system of the great majority of the States ever since the Union was first organized. Until *Furman* v. *Georgia*, this Court's opinions, if they did not squarely uphold the death penalty, consistently assumed its constitutionality. *Wilkerson* v. *Utah*, 99 U. S. 130 (1879); *In re Kemmler*, 136 U. S. 436 (1890); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947); *McGautha* v. *California*, 402 U. S. 183 (1971); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). In *Trop* v. *Dulles*, 356 U. S. 86, 99 (1958), four Members of the Court—Mr. Chief Justice Warren and Justices Black, Douglas, and Whittaker—agreed that "[w]hatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Until *Furman* v. *Georgia*, this was the consistent view of the Court and of every Justice who in a published opinion had addressed the question of the validity of capital punishment under the Eighth Amendment. In *Furman*, it was concluded by at least two Justices [4] that the death penalty had become unacceptable to the great majority of the people of this country and for that reason, alone or combined with other reasons, was invalid

[4] MR. JUSTICE MARSHALL wrote that the death penalty was invalid for several independent reasons, one of which was that "it is morally unacceptable to the people of the United States at this time in our history." 408 U. S., at 360. That capital punishment "has been almost totally rejected by contemporary society," *id.*, at 295, was one of four factors which together led MR. JUSTICE BRENNAN to invalidate the statute before us in *Furman* v. *Georgia*.

under the Eighth Amendment, which must be construed and applied to reflect the evolving moral standards of the country. *Trop* v. *Dulles, supra,* at 111; *Weems* v. *United States,* 217 U. S. 349, 378 (1910). That argument, whether or not accurate at that time, when measured by the manner in which the death penalty was being administered under the then-prevailing statutory schemes, is no longer descriptive of the country's attitude. Since the judgment in *Furman,* Congress and 35 state legislatures re-enacted the death penalty for one or more crimes.[5] All of these States authorize the death

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[5] The statutes are summarized in the Appendix to petitioner's brief in No. 73-7031, *Fowler* v. *North Carolina,* cert. granted, 419 U. S. 963 (1974), and in Appendix A to the petitioner's brief in No. 75-5394, *Jurek* v. *Texas, ante,* p. 262, decided this day. The various types of post-*Furman* statutes which have been enacted are described and analyzed in the Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690 (1974).

Following the invalidation of the death penalty in California by the California Supreme Court on state constitutional grounds in *People* v. *Anderson,* 6 Cal. 3d 628, 493 P. 2d 880, cert. denied, 406 U. S. 958 (1972), the State Constitution was amended by initiative and referendum to reinstate the penalty (with approximately two-thirds of those voting approving the measure). Cal. Const., Art. I, § 27 (effective Nov. 7, 1972). Approximately 64% of the voters at the 1968 Massachusetts general election voted "yes" to a referendum asking "Shall the commonwealth of Massachusetts retain the death penalty for crime?" See *Commonwealth* v. *O'Neal,* — Mass. —, —, 339 N. E. 2d 676, 708 (1975) (Reardon, J., dissenting). For other state referenda approving capital punishment, see *Furman* v. *Georgia,* 408 U. S., at 437–439 (POWELL, J., dissenting): Oregon (1964), Colorado (1966), Illinois (1970).

There have also been public opinion polls on capital punishment, see, *e. g.,* S. Rep. No. 93-721, pp. 13–14 (1974), but their validity and reliability have been strongly criticized, see, *e. g.,* Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan. L. Rev. 1245 (1974), and indeed neither the parties here nor *amici* rely on

penalty for murder of one kind or another. With these profound developments in mind, I cannot say that capital punishment has been rejected by or is offensive to the prevailing attitudes and moral presuppositions in the United States or that it is always an excessively cruel or severe punishment or always a disproportionate punishment for any crime for which it might be imposed.[6] These grounds for invalidating the death penalty are foreclosed by recent events, which this Court must accept as demonstrating that capital punishment is acceptable to the contemporary community as just punishment for at least some intentional killings.

It is apparent also that Congress and 35 state legislatures are of the view that capital punishment better serves the ends of criminal justice than would life imprisonment and that it is therefore not excessive in the sense that it serves no legitimate legislative or social ends. Petitioner Roberts, to the contrary, submits that life imprisonment obviously would better serve the end of reformation or rehabilitation and that there is no satisfactory evidence that punishing by death serves more effectively than does life imprisonment the other major ends of imposing serious criminal sanctions: incapacitation

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such polls as relevant to the issue before us. Brief for United States as *Amicus Curiae* 54.

[6] As shown by MR. JUSTICE POWELL's opinion in *Furman* v. *Georgia*, 408 U. S., at 442–443, n. 37, state death penalty statutes withstood constitutional challenge in the highest courts of 25 States. Post-*Furman* legislation has been widely challenged but has been sustained as not contrary to the Eighth and Fourteenth Amendments in the five States now before us and in Oklahoma (*e. g.*, *Davis* v. *State*, 542 P. 2d 532 (1975)). Final resolutions of cases in many other States is apparently awaiting our decision in the cases decided today. But see *Commonwealth* v. *O'Neal*, *supra*, and *People ex rel. Rice* v. *Cunningham*, 61 Ill. 2d 353, 336 N. E. 2d 1 (1975), invalidating the death penalty on state-law grounds.

of the prisoner, the deterrence of others, and moral reenforcement and retribution. The death penalty is therefore cruel and unusual, it is argued, because it is the purposeless taking of life and the needless imposition of suffering.

The widespread re-enactment of the death penalty, it seems to me, answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution. It also seems clear enough that death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not. This leaves the question of general deterrence as the principal battleground: Does the death penalty more effectively deter others from crime than does the threat of life imprisonment?

The debate on this subject started generations ago and is still in progress. Each side has a plethora of fact and opinion in support of its position,[7] some of it quite old

[7] The debate over the general deterrent effect of the death penalty and the relevant materials were canvassed exhaustively by MR. JUSTICE MARSHALL in his separate concurring opinion in *Furman, supra,* at 345–354. The debate has intensified since then. See Part III of Brief for Petitioner in No. 73-7301, *Fowler* v. *North Carolina, supra* (esp. pp. 121–130, and App. E, pp. 1e–10e), incorporated by reference in petitioner's brief in this case. See also Brief for United States as *Amicus Curiae* 34–35 in this and related cases. The focal point of the most recent stage of the debate has been Prof. Isaac Ehrlich's study of the issue. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975). For reactions to and comments on the Ehrlich study, see Statistical Evidence on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 164–227 (1975). See also Passell, The Deterrent Effect of the Death Penalty: A Statistical Test, 28 Stan. L. Rev. 61 (1975).

For analysis of some of the reasons for the inconclusive nature of statistical studies on the issue, see, *e. g.,* Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶¶ 62–67 (1953); Gibbs, Crime, Punishment, and Deterrence, 48 Sw. Soc.

and some of it very new; but neither has yet silenced the other. I need not detail these conflicting materials, most of which are familiar sources. It is quite apparent that the relative efficacy of capital punishment and life imprisonment to deter others from crime remains a matter about which reasonable men and reasonable legislators may easily differ. In this posture of the case, it would be neither a proper or wise exercise of the power of judicial review to refuse to accept the reasonable conclusions of Congress and 35 state legislatures that there are indeed certain circumstances in which the death penalty is the more efficacious deterrent of crime.

It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere. The issue is not whether, had we been legislators, we would have supported or opposed the capital punishment statutes presently before us. The question here under discussion is whether the Eighth Amendment requires us to interfere with the enforcement of these statutes on the grounds that a sentence of life imprisonment for the crimes at issue would as well have served the ends of criminal justice. In my view, the Eighth Amend-

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Sci. Q. 515 (1968); Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw. U. L. Rev. 433, 457–458 (1957). See also Posner, The Economic Approach to Law, 53 Tex. L. Rev. 757, 766–768 (1975).

For a study of the deterrent effect of punishment generally, see F. Zimring & G. Hawkins, Deterrence (1973), and especially *id.*, at 16, 18–19, 31, 62–64, 186–190 (for a general discussion of capital punishment as a deterrent).

ment provides no warrant for overturning these convictions on these grounds.

## IV

The plurality offers two additional reasons for invalidating the Louisiana statute, neither of which had been raised by the parties and with both of which I disagree.

The plurality holds the Louisiana statute unconstitutional for want of a separate sentencing proceeding in which the sentencing authority may focus on the sentence and consider some or all of the aggravating and mitigating circumstances. In *McGautha* v. *California,* 402 U. S. 183 (1971), after having heard the same issues argued twice before in *Maxwell* v. *Bishop,* 398 U. S. 262 (1970), we specifically rejected the claims that a defendant's "constitutional rights were infringed by permitting the jury to impose the death penalty without governing standards" and that "the jury's imposition of the death sentence in the same proceeding and verdict as determined the issue of guilt was [not] constitutionally permissible." 402 U. S., at 185. With respect to the necessity of a bifurcated criminal trial, we had reached essentially the same result in *Spencer* v. *Texas,* 385 U. S. 554 (1967). In spite of these cases, the plurality holds that the State must provide a procedure under which the sentencer may separately consider the character and record of the individual defendant, along with the circumstances of the particular offense, including any mitigating circumstances that may exist. For myself, I see no reason to reconsider *McGautha* and would not invalidate the Louisiana statute for its failure to provide what *McGautha* held it need not provide. I still share the concluding remarks of the Court in *McGautha* v. *California:*

> "It may well be, as the American Law Institute and the National Commission on Reform of Federal

Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. See *Spencer* v. *Texas,* 385 U. S. 554 (1967). The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected. From a constitutional standpoint we cannot conclude that it is impermissible for a State to consider that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury's attention solely on punishment after the issue of guilt has been determined.

"Certainly the facts of these gruesome murders bespeak no miscarriage of justice. The ability of juries, unassisted by standards, to distinguish between those defendants for whom the death penalty is appropriate punishment and those for whom imprisonment is sufficient is indeed illustrated by the discriminating verdict of the jury in McGautha's case, finding Wilkinson the less culpable of the two defendants and sparing his life.

"The procedures which petitioners challenge are those by which most capital trials in this country are conducted, and by which all were conducted until a few years ago. We have determined that these

> procedures are consistent with the rights to which petitioners were constitutionally entitled, and that their trials were entirely fair. Having reached these conclusions we have performed our task of measuring the States' process by federal constitutional standards . . . ." 402 U. S., at 221–222.

Implicit in the plurality's holding that a separate proceeding must be held at which the sentencer may consider the character and record of the accused is the proposition that States are constitutionally prohibited from considering any crime, no matter how defined, so serious that every person who commits it should be put to death regardless of extraneous factors related to his character. Quite apart from *McGautha* v. *California, supra,* I cannot agree. It is axiomatic that the major justification for concluding that a given defendant deserves to be punished is that he committed a crime. Even if the character of the accused *must* be considered under the Eighth Amendment, surely a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death. Moreover, quite apart from the character of a criminal, a State should constitutionally be able to conclude that the need to deter some crimes and that the likelihood that the death penalty will succeed in deterring these crimes is such that the death penalty may be made mandatory for all people who commit them. Nothing resembling a reasoned basis for the rejection of these propositions is to be found in the plurality opinion.

The remaining reason offered for invalidating the Louisiana statute is also infirm. It is said that the Eighth Amendment forbids the legislature to require imposition of the death penalty when the elements of the specified crime have been proved to the satisfac-

tion of the jury because historically the concept of the mandatory death sentence has been rejected by the community and departs so far from contemporary standards with respect to the imposition of capital punishment that it must be held unconstitutional.

Although the plurality seemingly makes an unlimited pronouncement, it actually stops short of invalidating any statute making death the required punishment for any crime whatsoever. Apparently there are some crimes for which the plurality in its infinite wisdom will permit the States to require the death sentence to be imposed without the additional procedures which its opinion seems to mandate. There have always been mandatory death penalties for at least some crimes, and the legislatures of at least two States have now again embraced this approach in order to serve what they deem to be their own penological goals.

Furthermore, JUSTICES STEWART, POWELL, and STEVENS uphold the capital punishment statute of Texas, under which capital punishment is required if the defendant is found guilty of the crime charged and the jury answers two additional questions in the affirmative. Once that occurs, no discretion is left to the jury; death is mandatory. Although Louisiana juries are not required to answer these precise questions, the Texas law is not constitutionally distinguishable from the Louisiana system under which the jury, to convict, must find the elements of the crime, including the essential element of intent to kill or inflict great bodily harm, which, according to the instructions given in this case, must be felonious, "that is, it must be wrong or without any just cause or excuse."

As the plurality now interprets the Eighth Amendment, the Louisiana and North Carolina statutes are infirm because the jury is deprived of all discretion once it finds the defendant guilty. Yet in the next breath it invali-

dates these statutes because they are said to invite or allow too much discretion: Despite their instructions, when they feel that defendants do not deserve to die, juries will so often and systematically disobey their instructions and find the defendant not guilty or guilty of a noncapital offense that the statute fails to satisfy the standards of *Furman* v. *Georgia*. If it is truly the case that Louisiana juries will exercise *too much* discretion—and I do not agree that it is—then it seems strange indeed that the statute is also invalidated because it purports to give the jury *too little* discretion by making the death penalty mandatory. Furthermore, if there is danger of freakish and too infrequent imposition of capital punishment under a mandatory system such as Louisiana's, there is very little ground for believing that juries will be any more faithful to their instructions under the Georgia and Florida systems where the opportunity is much, much greater for juries to practice their own brand of unbridled discretion.

In any event the plurality overreads the history upon which it so heavily relies. Narrowing the categories of crime for which the death penalty was authorized reflected a growing sentiment that death was an excessive penalty for many crimes, but I am not convinced, as apparently the plurality is, that the decision to vest discretionary sentencing power in the jury was a judgment that mandatory punishments were excessively cruel rather than merely a legislative response to avoid jury nullifications which were occurring with some frequency. That legislatures chose jury sentencing as the least troublesome of two approaches hardly proves legislative rejection of mandatory sentencing. State legislatures may have preferred to vest discretionary sentencing power in a jury rather than to have guilty defendants go scot-free; but I doubt that these events necessarily reflect

an affirmative legislative preference for discretionary systems or support an inference that legislatures would have chosen them even absent their experience with jury nullification.

Nor does the fact that juries at times refused to convict despite the evidence prove that the mandatory nature of the sentence was the burr under the jury's saddle rather than that one or more persons on those juries were opposed in principle to the death penalty under whatever system it might be authorized or imposed. Surely if every nullifying jury had been interrogated at the time and had it been proved to everyone's satisfaction that all or a large part of the nullifying verdicts occurred because certain members of these juries had been opposed to the death penalty in any form, rather than because the juries involved were reluctant to impose the death penalty on the particular defendants before them, it could not be concluded that either those juries or the country had condemned mandatory punishments as distinguished from the death penalty itself. The plurality nevertheless draws such an inference even though there is no more reason to infer that jury nullification occurred because of opposition to the death penalty in particular cases than because one or more of the 12 jurors on the critical juries were opposed to the death penalty in any form and stubbornly refused to participate in a guilty verdict. Of course, the plurality does not conclude that the death penalty was itself placed beyond legislative resuscitation either by jury nullification under mandatory statutes or by the erosion of the death penalty under the discretionary-sentencing systems that led to the judgment in *Furman* v. *Georgia*. I see no more basis for arriving at a contrary conclusion with respect to the mandatory statutes.

Louisiana and North Carolina have returned to the

mandatory capital punishment system for certain crimes.[8] Their legislatures have not deemed mandatory punishment, once the crime is proved, to be unacceptable; nor have their juries rejected it, for the death penalty has been imposed with some regularity. Perhaps we would

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[8] It is unclear to me why, because legislatures found shortcomings in their mandatory statutes and decided to try vesting absolute discretion in juries, the legislatures are constitutionally forbidden to return to mandatory statutes when shortcomings are discovered in their discretionary statutes. See *Furman* v. *Georgia*. Florida has in effect at the present time a statute under which the death penalty is mandatory whenever the sentencing judge finds that statutory aggravating factors outweigh the mitigating factors. Georgia has in effect a statute which gives the sentencer discretion in every case to decline to impose the death penalty. If Florida and all other states like it choose to adopt the Georgia statutory scheme, will the Eighth Amendment prevent them from later changing their minds and returning to their present scheme? I would think not.

Most of the States had in effect prior to *Furman* v. *Georgia* statutes under which even the least culpable first-degree murderer could be put to death. I simply cannot find from the decision to adopt such statutes a constitutional rule preventing the States from removing the standardless nature of sentencing under such statutes and replacing them with statutes under which all or a substantial portion of first-degree murderers are put to death.

This is particularly true in Louisiana. The most that the plurality can possibly infer from its own description of the history of capital punishment in this country is that the legislatures have rejected the proposition that *all* first-degree murderers should be put to death. This is so because the only mandatory statutes which were historically repealed or replaced were those which made death the mandatory punishment for *all* first-degree murders. Louisiana has now passed a statute which makes death the mandatory penalty for only five narrow categories of first-degree murder, not for all first-degree murders by any means. The history relied upon by the plurality is utterly silent on society's reaction to such a statute. It cannot be invalidated on the basis of contemporary standards because we do not know that it is inconsistent with such standards.

prefer that these States had adopted a different system, but the issue is not our individual preferences but the constitutionality of the mandatory systems chosen by these two States. I see no warrant under the Eighth Amendment for refusing to uphold these statutes.

Indeed, the more fundamental objection than the plurality's muddled reasoning is that in *Gregg* v. *Georgia, ante,* at 174–176, it lectures us at length about the role and place of the judiciary and then proceeds to ignore its own advice, the net effect being to suggest that observers of this institution should pay more attention to what we do than what we say. The plurality claims that it has not forgotten what the past has taught about the limits of judicial review; but I fear that it has again surrendered to the temptation to make policy for and to attempt to govern the country through a misuse of the powers given this Court under the Constitution.

## V

I conclude that § 14:30 of the Louisiana statutes imposing the death penalty for first-degree murder is not unconstitutional under the Eighth Amendment. I am not impressed with the argument that this result reduces the Amendment to little more than mild advice from the Framers to state legislators. *Weems, Trop,* and *Furman* bear witness to the contrary.

For the foregoing reasons, I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I dissent for the reasons set forth in my dissent in *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (1972), and in the other dissenting opinions I joined in that case. *Id.,* at 375, 414, and 465.

# SOUTH DAKOTA *v.* OPPERMAN

CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

No. 75–76. Argued March 29, 1976—Decided July 6, 1976

After respondent's car had been impounded for multiple parking violations the police, following standard procedures, inventoried the contents of the car. In doing so they discovered marihuana in the glove compartment, for the possession of which respondent was subsequently arrested. His motion to suppress the evidence yielded by the warrantless inventory search was denied, and respondent was thereafter convicted. The State Supreme Court reversed, concluding that the evidence had been obtained in violation of the Fourth Amendment as made applicable to the States by the Fourteenth. *Held:* The police procedures followed in this case did not involve an "unreasonable" search in violation of the Fourth Amendment. The expectation of privacy in one's automobile is significantly less than that relating to one's home or office, *Cardwell* v. *Lewis*, 417 U. S. 583, 590. When vehicles are impounded, police routinely follow caretaking procedures by securing and inventorying the cars' contents. These procedures have been widely sustained as reasonable under the Fourth Amendment. This standard practice was followed here, and there is no suggestion of any investigatory motive on the part of the police. Pp. 367–376.

89 S. D. —, 228 N. W. 2d 152, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 376. WHITE, J., filed a dissenting statement, *post*, p. 396. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEWART, JJ., joined, *post*, p. 384.

*William J. Janklow*, Attorney General of South Dakota, argued the cause for petitioner. With him on the brief was *Earl R. Mettler*, Assistant Attorney General.

*Robert C. Ulrich*, by appointment of the Court, 423

U. S. 1012, argued the cause for respondent *pro hac vice*. With him on the brief were *Lee M. McCahren* and *John F. Hagemann*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We review the judgment of the Supreme Court of South Dakota, holding that local police violated the Fourth Amendment to the Federal Constitution, as applicable to the States under the Fourteenth Amendment, when they conducted a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances.

(1)

Local ordinances prohibit parking in certain areas of downtown Vermillion, S. D., between the hours of 2 a. m. and 6 a. m. During the early morning hours of December 10, 1973, a Vermillion police officer observed respondent's unoccupied vehicle illegally parked in the restricted zone. At approximately 3 a. m., the officer issued an overtime parking ticket and placed it on the car's windshield. The citation warned:

> "Vehicles in violation of any parking ordinance may be towed from the area."

At approximately 10 o'clock on the same morning, an-

*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *S. Clark Moore*, Assistant Attorney General, and *Kent L. Richland* and *Robert R. Anderson*, Deputy Attorneys General, for the State of California; by *Theodore L. Sendak*, Attorney General, and *Donald P. Bogard*, Executive Assistant Attorney General, for the State of Indiana; by *Toney Anaya*, Attorney General, and *Warren O. F. Harris*, Deputy Attorney General, for the State of New Mexico; and by *Wayne W. Schmidt* for Americans for Effective Law Enforcement, Inc.

other officer issued a second ticket for an overtime parking violation. These circumstances were routinely reported to police headquarters, and after the vehicle was inspected, the car was towed to the city impound lot.

From outside the car at the impound lot, a police officer observed a watch on the dashboard and other items of personal property located on the back seat and back floorboard. At the officer's direction, the car door was then unlocked and, using a standard inventory form pursuant to standard police procedures, the officer inventoried the contents of the car, including the contents of the glove compartment, which was unlocked. There he found marihuana contained in a plastic bag. All items, including the contraband, were removed to the police department for safekeeping.[1] During the late afternoon of December 10, respondent appeared at the police department to claim his property. The marihuana was retained by police.

Respondent was subsequently arrested on charges of possession of marihuana. His motion to suppress the evidence yielded by the inventory search was denied; he was convicted after a jury trial and sentenced to a fine of $100 and 14 days' incarceration in the county jail. On appeal, the Supreme Court of South Dakota reversed

[1] At respondent's trial, the officer who conducted the inventory testified as follows:

"Q. And why did you inventory this car?

"A. Mainly for safekeeping, because we have had a lot of trouble in the past of people getting into the impound lot and breaking into cars and stealing stuff out of them.

"Q. Do you know whether the vehicles that were broken into . . . were locked or unlocked?

"A. Both of them were locked, they would be locked." Record 74.

In describing the impound lot, the officer stated:

"A. It's the old county highway yard. It has a wooden fence partially around part of it, and kind of a dilapidated wire fence, a makeshift fence." *Id.*, at 73.

the conviction. 89 S. D. —, 228 N. W. 2d 152. The court concluded that the evidence had been obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. We granted certiorari, 423 U. S. 923 (1975), and we reverse.

(2)

This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, *Cady* v. *Dombrowski,* 413 U. S. 433, 439 (1973), warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not. *Cardwell* v. *Lewis,* 417 U. S. 583, 589 (1974); *Cady* v. *Dombrowski, supra,* at 439–440; *Chambers* v. *Maroney,* 399 U. S. 42, 48 (1970).

The reason for this well-settled distinction is twofold. First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. *Carroll* v. *United States,* 267 U. S. 132, 153–154 (1925); *Coolidge* v. *New Hampshire,* 403 U. S. 443, 459–460 (1971). But the Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction. *Chambers* v. *Maroney, supra,* at 51–52; *Cooper* v. *California,* 386 U. S. 58 (1967). Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.[2] In discharging their varied re-

[2] In *Camara* v. *Municipal Court,* 387 U. S. 523 (1967), and *See* v. *City of Seattle,* 387 U. S. 541 (1967), the Court held that a warrant was required to effect an unconsented administrative entry

sponsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. *Cady* v. *Dombrowski, supra,* at 442. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel. Only two Terms ago, the Court noted:

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis, supra,* at 590.

In the interests of public safety and as part of what the Court has called "community caretaking functions," *Cady* v. *Dombrowski, supra,* at 441, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activi-

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into and inspection of private dwellings or commercial premises to ascertain health or safety conditions. In contrast, this procedure has never been held applicable to automobile inspections for safety purposes.

ties. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic.[3] The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, *United States* v. *Mitchell,* 458 F. 2d 960, 961 (CA9 1972); the protection of the police against claims or disputes over lost or stolen property, *United States* v. *Kelehar,* 470 F. 2d 176, 178 (CA5 1972); and the protection of the police from potential danger, *Cooper* v. *California, supra,* at 61–62. The practice has been viewed as essential to respond to incidents of theft or vandalism. See *Cabbler* v. *Commonwealth,* 212 Va. 520, 522, 184 S. E. 2d 781, 782 (1971), cert. denied, 405 U. S. 1073 (1972); *Warrix* v. *State,* 50 Wis. 2d 368, 376, 184 N. W. 2d 189, 194 (1971). In addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned.

These caretaking procedures have almost uniformly been upheld by the state courts, which by virtue of the localized nature of traffic regulation have had considerable occasion to deal with the issue.[4] Applying the

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[3] The New York Court of Appeals has noted that in New York City alone, 108,332 cars were towed away for traffic violations during 1969. *People* v. *Sullivan,* 29 N. Y. 2d 69, 71, 272 N. E. 2d 464, 465 (1971).

[4] In contrast to state officials engaged in everyday caretaking functions:

"The contact with vehicles by federal law enforcement officers

Fourth Amendment standard of "reasonableness," [5] the state courts have overwhelmingly concluded that, even if an inventory is characterized as a "search," [6] the

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usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle." *Cady* v. *Dombrowski*, 413 U. S. 433, 440 (1973).

[5] In analyzing the issue of reasonableness *vel non*, the courts have not sought to determine whether a protective inventory was justified by "probable cause." The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. See generally Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835, 850–851 (1974). The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.

In view of the noncriminal context of inventory searches, and the inapplicability in such a setting of the requirement of probable cause, courts have held—and quite correctly—that search warrants are not required, linked as the warrant requirement textually is to the probable-cause concept. We have frequently observed that the warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate unrelated to the criminal investigative-enforcement process. With respect to noninvestigative police inventories of automobiles lawfully within governmental custody, however, the policies underlying the warrant requirement, to which MR. JUSTICE POWELL refers, are inapplicable.

[6] Given the benign noncriminal context of the intrusion, see *Wyman* v. *James*, 400 U. S. 309, 317 (1971), some courts have concluded that an inventory does not constitute a search for Fourth Amendment purposes. See, *e. g.*, *People* v. *Sullivan*, *supra*, at 77, 272 N. E. 2d, at 469; *People* v. *Willis*, 46 Mich. App. 436, 208 N. W. 2d 204 (1973); *State* v. *Wallen*, 185 Neb. 44, 49–50, 173 N. W. 2d 372, 376, cert. denied, 399 U. S. 912 (1970). Other courts have expressed doubts as to whether the intrusion is classifiable as a search. *State* v. *All*, 17 N. C. App. 284, 286, 193 S. E. 2d 770, 772, cert. denied, 414 U. S. 866 (1973). Petitioner, however, has expressly abandoned the contention that the inventory in this case is exempt from the Fourth Amendment standard of reasonableness. Tr. of Oral Arg. 5.

intrusion is constitutionally permissible. See, *e. g., City of St. Paul* v. *Myles,* 298 Minn. 298, 300–301, 218 N. W. 2d 697, 699 (1974); *State* v. *Tully,* 166 Conn. 126, 136, 348 A. 2d 603, 609 (1974); *People* v. *Trusty,* 183 Colo. 291, 296–297, 516 P. 2d 423, 425–426 (1973); *People* v. *Sullivan,* 29 N. Y. 2d 69, 73, 272 N. E. 2d 464, 466 (1971); *Cabbler* v. *Commonwealth, supra; Warrix* v. *State, supra; State* v. *Wallen,* 185 Neb. 44, 173 N. W. 2d 372, cert. denied, 399 U. S. 912 (1970); *State* v. *Criscola,* 21 Utah 2d 272, 444 P. 2d 517 (1968); *State* v. *Montague,* 73 Wash. 2d 381, 438 P. 2d 571 (1968); *People* v. *Clark,* 32 Ill. App. 3d 898, 336 N. E. 2d 892 (1975); *State* v. *Achter,* 512 S. W. 2d 894 (Mo. Ct. App. 1974); *Bennett* v. *State,* 507 P. 2d 1252 (Okla. Crim. App. 1973); *People* v. *Willis,* 46 Mich. App. 436, 208 N. W. 2d 204 (1973); *State* v. *All,* 17 N. C. App. 284, 193 S. E. 2d 770, cert. denied, 414 U. S. 866 (1973); *Godbee* v. *State,* 224 So. 2d 441 (Fla. Dist. Ct. App. 1969). Even the seminal state decision relied on by the South Dakota Supreme Court in reaching the contrary result, *Mozzetti* v. *Superior Court,* 4 Cal. 3d 699, 484 P. 2d 84 (1971), expressly approved police caretaking activities resulting in the securing of property within the officer's plain view.

The majority of the Federal Courts of Appeals have likewise sustained inventory procedures as reasonable police intrusions. As Judge Wisdom has observed:

> "[W]hen the police take custody of any sort of container [such as] an automobile . . . it is reasonable to search the container to itemize the property to be held by the police. [This reflects] the underlying principle that the fourth amendment proscribes only *unreasonable* searches." *United States* v. *Gravitt,* 484 F. 2d 375, 378 (CA5 1973), cert. denied, 414 U. S. 1135 (1974) (emphasis in original).

See also *Cabbler* v. *Superintendent*, 528 F. 2d 1142 (CA4 1975), cert. pending, No. 75–1463; *Barker* v. *Johnson*, 484 F. 2d 941 (CA6 1973); *United States* v. *Mitchell*, 458 F. 2d 960 (CA9 1972); *United States* v. *Lipscomb*, 435 F. 2d 795 (CA5 1970), cert. denied, 401 U. S. 980 (1971); *United States* v. *Pennington*, 441 F. 2d 249 (CA5), cert. denied, 404 U. S. 854 (1971); *United States* v. *Boyd*, 436 F. 2d 1203 (CA5 1971); *Cotton* v. *United States*, 371 F. 2d 385 (CA9 1967). Accord, *Lowe* v. *Hopper*, 400 F. Supp. 970, 976–977 (SD Ga. 1975); *United States* v. *Spitalieri*, 391 F. Supp. 167, 169–170 (ND Ohio 1975); *United States* v. *Smith*, 340 F. Supp. 1023 (Conn. 1972); *United States* v. *Fuller*, 277 F. Supp. 97 (DC 1967), conviction aff'd, 139 U. S. App. D. C. 375, 433 F. 2d 533 (1970). These cases have recognized that standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration, *United States* v. *Pennington, supra*, at 251, as well as a place for the temporary storage of valuables.

(3)

The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable. In the first such case, Mr. Justice Black made plain the nature of the inquiry before us:

> "But the question here is not whether the search was *authorized* by state law. The question is rather whether the search was *reasonable* under the Fourth Amendment." *Cooper* v. *California*, 386 U. S., at 61 (emphasis added).

And, in his last writing on the Fourth Amendment, Mr. Justice Black said:

> "[T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It

> prohibits only '*unreasonable* searches and seizures.' The relevant test *is not the reasonableness of the opportunity to procure a warrant,* but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts." *Coolidge* v. *New Hampshire,* 403 U. S., at 509–510 (concurring and dissenting) (emphasis added).

In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents. In *Cooper* v. *California, supra,* the Court upheld the inventory of a car impounded under the authority of a state forfeiture statute. Even though the inventory was conducted in a distinctly criminal setting[7] and carried out a week after the car had been impounded, the Court nonetheless found that the car search, including examination of the glove compartment where contraband was found, was reasonable under the circumstances. This conclusion was reached despite the fact that no warrant had issued and probable cause to search for the contraband in the vehicle had not been established. The Court said in language explicitly applicable here:

> "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U. S., at 61–62.[8]

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[7] In *Cooper,* the owner had been arrested on narcotics charges, and the car was taken into custody pursuant to the state forfeiture statute. The search was conducted several months before the forfeiture proceedings were actually instituted.

[8] There was, of course, no certainty at the time of the search that forfeiture proceedings would ever be held. Accordingly, there

In the following Term, the Court in *Harris* v. *United States,* 390 U. S. 234 (1968), upheld the introduction of evidence, seized by an officer who, after conducting an inventory search of a car and while taking means to safeguard it, observed a car registration card lying on the metal stripping of the car door. Rejecting the argument that a warrant was necessary, the Court held that the intrusion was justifiable since it was "taken to protect the car while it was in police custody." *Id.,* at 236.[9]

Finally, in *Cady* v. *Dombrowski, supra,* the Court upheld a warrantless search of an automobile towed to a private garage even though no probable cause existed to believe that the vehicle contained fruits of a crime. The sole justification for the warrantless incursion was that it was incident to the caretaking function of the local police to protect the community's safety. Indeed, the protective search was instituted solely because local police "were under the impression" that the incapacitated driver, a Chicago police officer, was required to carry his service revolver at all times; the police had reasonable grounds to believe a weapon might be in the car, and thus available to vandals. 413 U. S., at 436. The Court carefully noted that the protective search was

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was no reason for the police to assume automatically that the automobile would eventually be forfeited to the State. Indeed, as the California Court of Appeal stated, "[T]he instant record nowhere discloses that forfeiture proceedings were instituted in respect to defendant's car . . . ." *People* v. *Cooper,* 234 Cal. App. 2d 587, 596, 44 Cal. Rptr. 483, 489 (1965). No reason would therefore appear to limit *Cooper* to an impoundment pursuant to a forfeiture statute.

[9] The Court expressly noted that the legality of the inventory was not presented, since the evidence was discovered at the point when the officer was taking protective measures to secure the automobile from the elements. But the Court clearly held that the officer acted properly in opening the car for protective reasons.

carried out in accordance with *standard procedures* in the local police department, *ibid.*, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function. See *United States* v. *Spitalieri*, 391 F. Supp., at 169. In reaching this result, the Court in *Cady* distinguished *Preston* v. *United States*, 376 U. S. 364 (1964), on the grounds that the holding, invalidating a car search conducted after a vagrancy arrest, "stands only for the proposition that the search challenged there could not be justified as one incident to an arrest." 413 U. S., at 444. *Preston* therefore did not raise the issue of the constitutionality of a protective inventory of a car lawfully within police custody.

The holdings in *Cooper*, *Harris*, and *Cady* point the way to the correct resolution of this case. None of the three cases, of course, involves the precise situation presented here; but, as in all Fourth Amendment cases, we are obliged to look to all the facts and circumstances of this case in light of the principles set forth in these prior decisions.

> "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case . . . ." *Cooper* v. *California*, 386 U. S., at 59.

The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. Cf. *United States* v. *Lawson*, 487 F. 2d 468, 471 (CA8 1973). The inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of

valuables inside the car. As in *Cady*, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.[10]

On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.

The judgment of the South Dakota Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE POWELL, concurring.

While I join the opinion of the Court, I add this opinion to express additional views as to why the search conducted in this case is valid under the Fourth and Fourteenth Amendments. This inquiry involves two distinct questions: (i) whether routine inventory searches are impermissible, and (ii) if not, whether they must be conducted pursuant to a warrant.

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[10] The inventory was not unreasonable in scope. Respondent's motion to suppress in state court challenged the inventory only as to items inside the car not in plain view. But once the policeman was lawfully inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the car.

The "consent" theory advanced by the dissent rests on the assumption that the inventory is exclusively for the protection of the car owner. It is not. The protection of the municipality and public officers from claims of lost or stolen property and the protection of the public from vandals who might find a firearm, *Cady* v. *Dombrowski*, or as here, contraband drugs, are also crucial.

## I

The central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. See, *e. g.*, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975); *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967). None of our prior decisions is dispositive of the issue whether the Amendment permits routine inventory "searches" [1] of automobiles.[2] Resolution of this

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[1] Routine inventories of automobiles intrude upon an area in which the private citizen has a "reasonable expectation of privacy." *Katz* v. *United States*, 389 U. S. 347, 360 (1967) (Harlan, J., concurring). Thus, despite their benign purpose, when conducted by government officials they constitute "searches" for purposes of the Fourth Amendment. See *Terry* v. *Ohio*, 392 U. S. 1, 18 n. 15 (1968); *United States* v. *Lawson*, 487 F. 2d 468 (CA8 1973); *Mozzetti* v. *Superior Court*, 4 Cal. 3d 699, 709–710, 484 P. 2d 84, 90–91 (1971) (en banc). Cf. *Cardwell* v. *Lewis*, 417 U. S. 583, 591 (1974) (plurality opinion).

[2] The principal decisions relied on by the State to justify the inventory search in this case, *Harris* v. *United States*, 390 U. S. 234 (1968); *Cooper* v. *California*, 386 U. S. 58 (1967); and *Cady* v. *Dombrowski*, 413 U. S. 433 (1973), each relied in part on significant factors not found here. *Harris* only involved an application of the "plain view" doctrine. In *Cooper* the Court validated an automobile search that took place one week after the vehicle was impounded on the theory that the police had a possessory interest in the car based on a state forfeiture statute requiring them to retain it some four months until the forfeiture sale. See 386 U. S., at 61–62. Finally, in *Cady* the Court held that the search of an automobile trunk "which the officer reasonably believed to contain a gun" was not unreasonable within the meaning of the Fourth and Fourteenth Amendments. 413 U. S., at 448. See also *id.*, at 436–437. The police in a typical inventory search case, however, will have no reasonable belief as to the particular automobile's contents. And, although the police in this case knew with certainty that there were items of personal property within the exposed interior of the car—*i. e.*, the watch on the dashboard—see *ante*, at 366, this information

question requires a weighing of the governmental and societal interests advanced to justify such intrusions against the constitutionally protected interest of the individual citizen in the privacy of his effects. *United States* v. *Martinez-Fuerte, post,* at 555; *United States* v. *Brignoni-Ponce, supra,* at 878–879; *United States* v. *Ortiz,* 422 U. S. 891, 892 (1975); *Cady* v. *Dombrowski,* 413 U. S. 433, 447–448 (1973); *Terry* v. *Ohio,* 392 U. S. 1, 20–21 (1968). Cf. *Camara* v. *Municipal Court, supra,* at 534–535. As noted in the Court's opinion, see *ante,* at 369, three interests generally have been advanced in support of inventory searches: (i) protection of the police from danger; (ii) protection of the police against claims and disputes over lost or stolen property; and (iii) protection of the owner's property while it remains in police custody.

Except in rare cases, there is little danger associated with impounding unsearched automobiles. But the occasional danger that may exist cannot be discounted entirely. See *Cooper* v. *California,* 386 U. S. 58, 61–62 (1967). The harmful consequences in those rare cases may be great, and there does not appear to be any effective way of identifying in advance those circumstances or classes of automobile impoundments which represent a greater risk. Society also has an important interest in minimizing the number of false claims filed against police since they may diminish the community's respect for law enforcement generally and lower department morale, thereby impairing the effectiveness of the police.[3] It

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alone did not, in the circumstances of this case, provide additional justification for the search of the closed console glove compartment in which the contraband was discovered.

[3] The interest in protecting the police from liability for lost or stolen property is not relevant in this case. Respondent's motion to suppress was limited to items inside the automobile not in plain

is not clear, however, that inventories are a completely effective means of discouraging false claims, since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from the police records.

The protection of the owner's property is a significant interest for both the policeman and the citizen. It is argued that an inventory is not necessary since locked doors and rolled-up windows afford the same protection that the contents of a parked automobile normally enjoy.[4] But many owners might leave valuables in their automobile temporarily that they would not leave there unattended for the several days that police custody may last. There is thus a substantial gain in security if automobiles are inventoried and valuable items removed for storage. And, while the same security could be attained by posting a guard at the storage lot, that alternative may be prohibitively expensive, especially for smaller jurisdictions.[5]

Against these interests must be weighed the citizen's interest in the privacy of the contents of his automobile. Although the expectation of privacy in an automobile is significantly less than the traditional expectation of privacy associated with the home, *United States* v. *Martinez-Fuerte, post,* at 561–562; *United States* v. *Ortiz, supra,* at 896 n. 2; see *Cardwell* v. *Lewis,* 417 U. S. 583, 590–591 (1974) (plurality opinion), the unrestrained search

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view. And, the Supreme Court of South Dakota here held that the removal of objects in plain view, and the closing of windows and locking of doors, satisfied any duty the police department owed the automobile's owner to protect property in police possession. 89 S. D. —, —, 228 N. W. 2d 152, 159 (1975).

[4] See *Mozzetti* v. *Superior Court, supra,* at 709–710, 484 P. 2d, at 90–91.

[5] See Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835, 853 (1974).

of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances. But such a search is not at issue in this case. As the Court's opinion emphasizes, the search here was limited to an inventory of the unoccupied automobile and was conducted strictly in accord with the regulations of the Vermillion Police Department.[6] Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles.[7]

I agree with the Court that the Constitution permits routine inventory searches, and turn next to the question whether they must be conducted pursuant to a warrant.

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[6] A complete "inventory report" is required of all vehicles impounded by the Vermillion Police Department. The standard inventory consists of a survey of the vehicle's exterior—windows, fenders, trunk, and hood—apparently for damage, and its interior, to locate "valuables" for storage. As part of each inventory a standard report form is completed. The report in this case listed the items discovered in both the automobile's interior and the unlocked glove compartment. The only notation regarding the trunk was that it was locked. A police officer testified that all impounded vehicles are searched, that the search always includes the glove compartment, and that the trunk had not been searched in this case because it was locked. See Record 33–34, 73–79.

[7] As part of their inventory search the police may discover materials such as letters or checkbooks that "touch upon intimate areas of an individual's personal affairs," and "reveal much about a person's activities, associations, and beliefs." *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 78–79 (1974) (POWELL, J., concurring). See also *Fisher* v. *United States*, 425 U. S. 391, 401 n. 7 (1976). In this case the police found, *inter alia*, "miscellaneous papers," a checkbook, an installment loan book, and a social security status card. Record 77. There is, however, no evidence in the record that in carrying out their established inventory duties the Vermillion police do other than search for and remove for storage such property without examining its contents.

## II

While the Fourth Amendment speaks broadly in terms of "unreasonable searches and seizures," [8] the decisions of this Court have recognized that the definition of "reasonableness" turns, at least in part, on the more specific dictates of the Warrant Clause. See *United States* v. *United States District Court,* 407 U. S. 297, 315 (1972); *Katz* v. *United States,* 389 U. S. 347, 356 (1967); *Camara* v. *Municipal Court,* 387 U. S., at 528. As the Court explained in *Katz* v. *United States, supra,* at 357, "[s]earches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' *Agnello* v. *United States,* 269 U. S. 20, 33, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . .' *Wong Sun* v. *United States,* 371 U. S. 471, 481–482." Thus, although "[s]ome have argued that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable,' *United States* v. *Rabinowitz,* 339 U. S. 56, 66 (1950)," "[t]his view has not been accepted." *United States* v. *United States District Court, supra,* at 315, and n. 16. See *Chimel* v. *California,* 395 U. S. 752 (1969). Except in a few carefully defined classes of cases, a search of private property without valid consent is "unreasonable" unless it has been authorized by a valid search warrant. See, *e. g., Almeida-Sanchez* v. *United States,* 413 U. S. 266, 269 (1973); *Stoner* v. *California,* 376 U. S. 483, 486 (1964);

[8] The Amendment provides that

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

*Camara* v. *Municipal Court, supra,* at 528; *United States* v. *Jeffers,* 342 U. S. 48, 51 (1951); *Agnello* v. *United States,* 269 U. S. 20, 30 (1925).

Although the Court has validated warrantless searches of automobiles in circumstances that would not justify a search of a home or office, *Cady* v. *Dombrowski,* 413 U. S. 433 (1973); *Chambers* v. *Maroney,* 399 U. S. 42 (1970); *Carroll* v. *United States,* 267 U. S. 132 (1925), these decisions establish no general "automobile exception" to the warrant requirement. See *Preston* v. *United States,* 376 U. S. 364 (1964). Rather, they demonstrate that " 'for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars,' " *Cady* v. *Dombrowski, supra,* at 439, quoting *Chambers* v. *Maroney, supra,* at 52, a difference that may in some cases justify a warrantless search.[9]

The routine inventory search under consideration in this case does not fall within any of the established exceptions to the warrant requirement.[10] But examination of the interests which are protected when searches are

[9] This difference turns primarily on the mobility of the automobile and the impracticability of obtaining a warrant in many circumstances, *e. g., Carroll* v. *United States,* 267 U. S. 132, 153–154 (1925). The lesser expectation of privacy in an automobile also is important. See *United States* v. *Ortiz,* 422 U. S. 891, 896 n. 2 (1975); *Cardwell* v. *Lewis,* 417 U. S., at 590; *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 279 (1973) (POWELL, J., concurring). See *Cady* v. *Dombrowski,* 413 U. S., at 441–442.

[10] See, *e. g., Chimel* v. *California,* 395 U. S. 752 (1969); *Terry* v. *Ohio,* 392 U. S. 1 (1968); *Warden* v. *Hayden,* 387 U. S. 294, 298–300 (1967); *Cooper* v. *California,* 386 U. S. 58 (1967); *Brinegar* v. *United States,* 338 U. S. 160, 174–177 (1949); *Carroll* v. *United States, supra,* at 153, 156. See also *McDonald* v. *United States,* 335 U. S. 451, 454–456 (1948); *United States* v. *Mapp,* 476 F. 2d 67, 76 (CA2 1973) (listing then-recognized exceptions to warrant requirement: (i) hot pursuit; (ii) plain-view doctrine; (iii) emergency situation; (iv) automobile search; (v) consent; and (vi) incident to arrest).

conditioned on warrants issued by a judicial officer reveals that none of these is implicated here. A warrant may issue only upon "probable cause." In the criminal context the requirement of a warrant protects the individual's legitimate expectation of privacy against the overzealous police officer. "Its protection consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 14 (1948). See, *e. g., United States* v. *United States District Court, supra,* at 316–318. Inventory searches, however, are not conducted in order to discover evidence of crime. The officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.

A related purpose of the warrant requirement is to prevent hindsight from affecting the evaluation of the reasonableness of a search. See *United States* v. *Martinez-Fuerte, post,* at 565; cf. *United States* v. *Watson,* 423 U. S. 411, 455 n. 22 (1976) (MARSHALL, J., dissenting). In the case of an inventory search conducted in accordance with standard police department procedures, there is no significant danger of hindsight justification. The absence of a warrant will not impair the effectiveness of post-search review of the reasonableness of a particular inventory search.

Warrants also have been required outside the context of a criminal investigation. In *Camara* v. *Municipal Court,* the Court held that, absent consent, a warrant was necessary to conduct an areawide building code in-

spection, even though the search could be made absent cause to believe that there were violations in the particular buildings being searched. In requiring a warrant the Court emphasized that "[t]he practical effect of [the existing warrantless search procedures had been] to leave the occupant subject to the discretion of the official in the field," since

> "when [an] inspector demands entry, the occupant ha[d] no way of knowing whether enforcement of the municipal code involved require[d] inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself [was] acting under proper authorization." 387 U. S., at 532.

In the inventory search context these concerns are absent. The owner or prior occupant of the automobile is not present, nor, in many cases, is there any real likelihood that he could be located within a reasonable period of time. More importantly, no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope.[11]

In sum, I agree with the Court that the routine inventory search in this case is constitutional.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

The Court today holds that the Fourth Amendment permits a routine police inventory search of the closed

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[11] In this case, for example, the officer who conducted the search testified that the offending automobile was towed to the city impound lot after a second ticket had been issued for a parking violation. The officer further testified that all vehicles taken to the lot are searched in accordance with a "standard inventory sheet" and "all items [discovered in the vehicles] are removed for safekeeping." Record 74. See n. 6, *supra*.

glove compartment of a locked automobile impounded for ordinary traffic violations. Under the Court's holding, such a search may be made without attempting to secure the consent of the owner and without any particular reason to believe the impounded automobile contains contraband, evidence, or valuables, or presents any danger to its custodians or the public.[1] Because I believe this holding to be contrary to sound elaboration of established Fourth Amendment principles, I dissent.

As MR. JUSTICE POWELL recognizes, the requirement of a warrant aside, resolution of the question whether an inventory search of closed compartments inside a locked automobile can ever be justified as a constitutionally "reasonable" search [2] depends upon a reconciliation of the owner's constitutionally protected privacy interests against governmental intrusion, and legitimate governmental interests furthered by securing the car and its contents. *Terry* v. *Ohio*, 392 U. S. 1, 20–21 (1968); *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, 536–537 (1967). The Court fails clearly to articulate the reasons for its reconciliation of these interests in this case, but it is at least clear to me that the considerations

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[1] The Court does not consider, however, whether the police might open and search the glove compartment if it is locked, or whether the police might search a locked trunk or other compartment.

[2] I agree with MR. JUSTICE POWELL's conclusion, *ante*, at 377 n. 1, that, as petitioner conceded, Tr. of Oral Arg. 5, the examination of the closed glove compartment in this case is a "search." See *Camara* v. *Municipal Court*, 387 U. S. 523, 530 (1967): "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." See also *Cooper* v. *California*, 386 U. S. 58, 61 (1967), quoted in n. 5, *infra*. Indeed, the Court recognized in *Harris* v. *United States*, 390 U. S. 234, 236 (1968), that the procedure invoked here would constitute a search for Fourth Amendment purposes.

alluded to by the Court, and further discussed by MR. JUSTICE POWELL, are insufficient to justify the Court's result in this case.

To begin with, the Court appears to suggest by reference to a "diminished" expectation of privacy, *ante*, at 368, that a person's constitutional interest in protecting the integrity of closed compartments of his locked automobile may routinely be sacrificed to governmental interests requiring interference with that privacy that are less compelling than would be necessary to justify a search of similar scope of the person's home or office. This has never been the law. The Court correctly observes that some prior cases have drawn distinctions between automobiles and homes or offices in Fourth Amendment cases; but even as the Court's discussion makes clear, the reasons for distinction in those cases are not present here. Thus, *Chambers* v. *Maroney*, 399 U. S. 42 (1970), and *Carroll* v. *United States*, 267 U. S. 132 (1925), permitted certain probable-cause searches to be carried out without warrants in view of the exigencies created by the mobility of automobiles, but both decisions reaffirmed that the standard of probable cause necessary to authorize such a search was no less than the standard applicable to search of a home or office. *Chambers*, *supra*, at 51; *Carroll*, *supra*, at 155–156.[3] In other contexts the Court has recognized that automobile travel sacrifices some privacy interests to the publicity of plain view, *e. g.*, *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion); cf. *Harris* v. *United States*, 390 U. S. 234 (1968). But this recognition, too, is inapposite here, for there is no question of plain view in

[3] This is, of course, "probable cause in the sense of specific knowledge about a particular automobile." *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 281 (1973) (POWELL, J., concurring).

this case.[4] Nor does this case concern intrusions of the scope that the Court apparently assumes would ordinarily be permissible in order to insure the running safety of a car. While it may be that privacy expectations associated with automobile travel are in some regards less than those associated with a home or office, see *United States* v. *Martinez-Fuerte*, *post*, at 561–562, it is equally clear that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away . . . ," *Coolidge* v. *New Hampshire*, 403 U. S. 443,

[4] In its opinion below, the Supreme Court of South Dakota stated that in its view the police were constitutionally justified in entering the car to remove, list, and secure objects in plain view from the outside of the car. 89 S. D. —, —, 228 N. W. 2d 152, 158–159 (1975). This issue is not presented on certiorari here.

Contrary to the Court's assertion, however, *ante*, at 375–376, the search of respondent's car was not in any way "prompted by the presence in plain view of a number of valuables inside the car." In fact, the record plainly states that every vehicle taken to the city impound lot was inventoried, Record 33, 74, 75, and that as a matter of "standard procedure," "every inventory search" would involve entry into the car's closed glove compartment. *Id.*, at 43, 44. See also Tr. of Oral Arg. 7. In any case, as MR. JUSTICE POWELL recognizes, *ante*, at 377–378, n. 2, entry to remove plain-view articles from the car could not justify a further search into the car's closed areas. Cf. *Chimel* v. *California*, 395 U. S. 752, 763, 764–768 (1969). Despite the Court's confusion on this point—further reflected by its discussion of *Mozzetti* v. *Superior Court*, 4 Cal. 3d 699, 484 P. 2d 84 (1971), *ante*, at 371, and its reliance on state and lower federal-court cases approving nothing more than inventorying of plain-view items, *e. g.*, *Barker* v. *Johnson*, 484 F. 2d 941 (CA6 1973); *United States* v. *Mitchell*, 458 F. 2d 960 (CA9 1972); *United States* v. *Fuller*, 277 F. Supp. 97 (DC 1967), conviction aff'd, 139 U. S. App. D. C. 375, 433 F. 2d 533 (1970); *State* v. *Tully*, 166 Conn. 126, 348 A. 2d 603 (1974); *State* v. *Achter*, 512 S. W. 2d 894 (Mo. Ct. App. 1974); *State* v. *All*, 17 N. C. App. 284, 193 S. E. 2d 770, cert. denied, 414 U. S. 866 (1973)—I must conclude that the Court's holding also permits the intrusion into a car and its console even in the absence of articles in plain view.

461 (1971).[5] Thus, we have recognized that "[a] *search*, even of an automobile, is a substantial invasion of privacy," *United States* v. *Ortiz*, 422 U. S. 891, 896 (1975) (emphasis added), and accordingly our cases have consistently recognized that the nature and substantiality of interest required to justify a *search* of private areas of an automobile is no less than that necessary to justify an intrusion of similar scope into a home or office. See, *e. g., United States* v. *Ortiz, supra; Almeida-Sanchez* v. *United States*, 413 U. S. 266, 269–270 (1973); *Coolidge, supra; Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216, 221–222 (1968); *Preston* v. *United States*, 376 U. S. 364 (1964).[6]

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[5] Moreover, as the Court observed in *Cooper* v. *California, supra*, at 61: "'[L]awful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it.'"

[6] It would be wholly unrealistic to say that there is no reasonable and actual expectation in maintaining the privacy of closed compartments of a locked automobile, when it is customary for people in this day to carry their most personal and private papers and effects in their automobiles from time to time. Cf. *Katz* v. *United States*, 389 U. S. 347, 352 (1967) (opinion of the Court); *id.*, at 361 (Harlan, J., concurring). Indeed, this fact is implicit in the very basis of the Court's holding—that such compartments may contain valuables in need of safeguarding.

MR. JUSTICE POWELL observes, *ante*, at 380, and n. 7, that the police would not be justified in sifting through papers secured under the procedure employed here. I agree with this, and I note that the Court's opinion does not authorize the inspection of suitcases, boxes, or other containers which might themselves be sealed, removed, and secured without further intrusion. See, *e. g., United States* v. *Lawson*, 487 F. 2d 468 (CA8 1973); *State* v. *McDougal*, 68 Wis. 2d 399, 228 N. W. 2d 671 (1975); *Mozzetti* v. *Superior Court, supra*. But this limitation does not remedy the Fourth Amendment intrusion when the simple inventorying of closed areas discloses tokens, literature, medicines, or other things which on their face may "reveal much about a person's activities, associations, and beliefs,"

The Court's opinion appears to suggest that its result may in any event be justified because the inventory search procedure is a "reasonable" response to

> "three distinct needs: the protection of the owner's property while it remains in police custody . . . ; the protection of the police against claims or disputes over lost or stolen property . . . ; and the protection of the police from potential danger." *Ante*, at 369.[7]

This suggestion is flagrantly misleading, however, because the record of this case explicitly belies any relevance of the last two concerns. In any event it is my view that none of these "needs," separately or together, can suffice to justify the inventory search procedure approved by the Court.

First, this search cannot be justified in any way as a safety measure, for—though the Court ignores it—the sole purpose given by the State for the Vermillion police's inventory procedure was to secure *valuables*, Record 75, 98. Nor is there any indication that the officer's search in this case was tailored in any way to safety concerns, or that ordinarily it is so circumscribed. Even aside from the actual basis for the police practice in this case, however, I do not believe that any blanket safety argument could justify a program of routine

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*California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 78–79 (1974) (POWELL, J., concurring).

[7] The Court also observes that "[i]n addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned." *Ante*, at 369. The Court places no reliance on this concern in this case, however, nor could it. There is no suggestion that the police suspected that respondent's car was stolen, or that their search was directed at, or stopped with, a determination of the car's ownership. Indeed, although the police readily identified the car as respondent's, Record 98–99, the record does not show that they ever sought to contact him.

searches of the scope permitted here. As MR. JUSTICE POWELL recognizes, ordinarily "there is little danger associated with impounding unsearched automobiles," *ante*, at 378.[8] Thus, while the safety rationale may not be entirely discounted when it is actually relied upon, it surely cannot justify the search of every car upon the basis of undifferentiated possibility of harm; on the contrary, such an intrusion could ordinarily be justified only in those individual cases where the officer's inspection was prompted by specific circumstances indicating the pos-

[8] The very premise of the State's chief argument, that the cars must be searched in order to protect valuables because no guard is posted around the vehicles, itself belies the argument that they must be searched at the city lot in order to protect the police there. These circumstances alone suffice to distinguish the dicta from *Cooper* v. *California*, 386 U. S., at 61–62, recited by the Court, *ante*, at 373.

The Court suggests a further "crucial" justification for the search in this case: "protection of the *public* from vandals who might find a firearm, *Cady* v. *Dombrowski*, [413 U. S. 433 (1973)], or as here, contraband drugs" (emphasis added). *Ante*, at 376 n. 10. This rationale, too, is absolutely without support in this record. There is simply no indication the police were looking for dangerous items. Indeed, even though the police found shotgun shells in the interior of the car, they never opened the trunk to determine whether it might contain a shotgun. Cf. *Cady*, *supra*. Aside from this, the suggestion is simply untenable as a matter of law. If this asserted rationale justifies search of all impounded automobiles, it must logically also justify the search of *all* automobiles, whether impounded or not, located in a similar area, for the argument is not based upon the custodial role of the police. See also *Cooper* v. *California*, *supra*, at 61, quoted in n. 5, *supra*. But this Court has never permitted the search of any car or home on the mere undifferentiated assumption that it might be vandalized and the vandals might find dangerous weapons or substances. Certainly *Cady* v. *Dombrowski*, permitting a limited search of a wrecked automobile where, *inter alia*, the police had a reasonable belief that the car contained a specific firearm, 413 U. S., at 448, does not so hold.

sibility of a particular danger. See *Terry* v. *Ohio,* 392 U. S., at 21, 27; cf. *Cady* v. *Dombrowski,* 413 U. S. 433, 448 (1973).

Second, the Court suggests that the search for valuables in the closed glove compartment might be justified as a measure to protect the police against lost property claims. Again, this suggestion is belied by the record, since—although the Court declines to discuss it—the South Dakota Supreme Court's interpretation of state law explicitly absolves the police, as "gratuitous depositors," from any obligation beyond inventorying objects in plain view and locking the car. 89 S. D. —, —, 228 N. W. 2d 152, 159 (1975).[9] Moreover, as MR. JUSTICE POWELL notes, *ante,* at 378–379, it may well be doubted that an inventory procedure would in any event work significantly to minimize the frustrations of false claims.[10]

Finally, the Court suggests that the public interest in protecting valuables that may be found inside a closed compartment of an impounded car may justify the inventory procedure. I recognize the genuineness of this governmental interest in protecting property from pilferage. But even if I assume that the posting of a guard would be fiscally impossible as an alternative means to

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[9] Even were the State to impose a higher standard of custodial responsibility upon the police, however, it is equally clear that such a requirement must be read in light of the Fourth Amendment's pre-eminence to require protective measures other than interior examination of closed areas.

[10] Indeed, if such claims can be deterred at all, they might more effectively be deterred by sealing the doors and trunk of the car so that an unbroken seal would certify that the car had not been opened during custody. See *Cabbler* v. *Superintendent,* 374 F. Supp. 690, 700 (ED Va. 1974), rev'd, 528 F. 2d 1142 (CA4 1975), cert. pending, No. 75–1463.

the same protective end,[11] I cannot agree with the Court's conclusion. The Court's result authorizes—indeed it appears to require—the routine search of nearly every[12] car impounded.[13] In my view, the Constitution does not permit such searches as a matter of routine; absent specific consent, such a search is permissible only in exceptional circumstances of particular necessity.

It is at least clear that any owner might prohibit the police from executing a protective search of his impounded car, since by hypothesis the inventory is conducted for the owner's benefit. Moreover, it is obvious that not everyone whose car is impounded would want it to be searched. Respondent himself proves this; but

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[11] I do not believe, however, that the Court is entitled to make this assumption, there being no such indication in the record. Cf. *Cady* v. *Dombrowski*, *supra*, at 447.

[12] The Court makes clear, *ante*, at 375, that the police may not proceed to search an impounded car if the owner is able to make other arrangements for the safekeeping of his belongings. Additionally, while the Court does not require consent before a search, it does not hold that the police may proceed with such a search in the face of the owner's denial of permission. In my view, if the owner of the vehicle is in police custody or otherwise in communication with the police, his consent to the inventory is prerequisite to an inventory search. See *Cabbler* v. *Superintendent*, *supra*, at 700; cf. *State* v. *McDougal*, 68 Wis. 2d, at 413, 228 N. W. 2d, at 678; *Mozzetti* v. *Superior Court*, 4 Cal. 3d, at 708, 484 P. 2d, at 89.

[13] In so requiring, the Court appears to recognize that a search of some, but not all, cars which there is no specific cause to believe contain valuables would itself belie any asserted property-securing purpose.

The Court makes much of the fact that the search here was a routine procedure, and attempts to analogize *Cady* v. *Dombrowski*. But it is quite clear that the routine in *Cady* was only to search where there was a reasonable belief that the car contained a dangerous weapon, 413 U. S., at 442; see *Dombrowski* v. *Cady*, 319 F. Supp. 530, 532 (ED Wis. 1970), not, as here, to search every car in custody without particular cause.

one need not carry contraband to prefer that the police not examine one's private possessions. Indeed, that preference is the premise of the Fourth Amendment. Nevertheless, according to the Court's result the law may presume that each owner in respondent's position consents to the search. I cannot agree. In my view, the Court's approach is squarely contrary to the law of consent; [14] it ignores the duty, in the absence of consent, to analyze in each individual case whether there is a need to search a particular car for the protection of its owner which is sufficient to outweigh the particular invasion. It is clear to me under established principles that in order to override the absence of explicit consent, such a search must at least be conditioned upon the fulfillment of two requirements.[15] First, there must be specific cause to believe that a search of the scope to be undertaken is necessary in order to preserve the integrity of particular valuable property threatened by the impoundment:

> "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which . . . reasonably warrant that intrusion." *Terry* v. *Ohio,* 392 U. S., at 21.

Such a requirement of "specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence," *id.,* at 21 n. 18, for "[t]he basic purpose of this

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[14] Even if it may be true that many persons would ordinarily consent to a protective inventory of their car upon its impoundment, this fact is not dispositive since even a majority lacks authority to consent to the search of *all* cars in order to assure the search of theirs. Cf. *United States* v. *Matlock,* 415 U. S. 164, 171 (1974); *Stoner* v. *California,* 376 U. S. 483 (1964).

[15] I need not consider here whether a warrant would be required in such a case.

Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court,* 387 U. S., at 528. Cf. *United States* v. *Brignoni-Ponce,* 422 U. S. 873, 883–884 (1975); *Cady* v. *Dombrowski,* 413 U. S., at 448; *Terry* v. *Ohio, supra,* at 27. Second, even where a search might be appropriate, such an intrusion may only follow the exhaustion and failure of reasonable efforts under the circumstances to identify and reach the owner of the property in order to facilitate alternative means of security or to obtain his consent to the search, for in this context the right to refuse the search remains with the owner. Cf. *Bumper* v. *North Carolina,* 391 U. S. 543 (1968).[16]

Because the record in this case shows that the procedures followed by the Vermillion police in searching respondent's car fall far short of these standards, in my view the search was impermissible and its fruits must be suppressed. First, so far as the record shows, the police in this case had no reason to believe that the glove compartment of the impounded car contained particular property of any substantial value. Moreover, the owner had apparently thought it adequate to protect whatever he left in the car overnight on the street in a business area simply to lock the car, and there is nothing in the record to show that the im-

[16] Additionally, although not relevant on this record, since the inventory procedure is premised upon benefit to the owner, it cannot be executed in any case in which there is reason to believe the owner would prefer to forgo it. This principle, which is fully consistent with the Court's result today, requires, for example, that when the police harbor suspicions (amounting to less than probable cause) that evidence or contraband may be found inside the automobile, they may not inventory it, for they must presume that the owner would refuse to permit the search.

poundment lot would prove a less secure location against pilferage,[17] cf. *Mozzetti* v. *Superior Court*, 4 Cal. 3d 699, 707, 484 P. 2d 84, 89 (1971), particularly when it would seem likely that the owner would claim his car and its contents promptly, at least if it contained valuables worth protecting.[18] Even if the police had cause to believe that the impounded car's glove compartment contained particular valuables, however, they made no effort to secure the owner's consent to the search. Although the Court relies, as it must, upon the fact that respondent was not present to make other arrangements for the care of his belongings, *ante*, at 375, in my view that is not the end of the inquiry. Here the police readily ascertained the ownership of the vehicle, Record 98–99, yet they searched it immediately without taking any steps to locate respondent and procure his consent to the inventory or advise him to make alternative arrangements to safeguard his property, *id.*, at 32, 72, 73, 79. Such a failure is inconsistent with the rationale that the inventory procedure is carried out for the benefit of the owner.

The Court's result in this case elevates the conservation of property interests—indeed mere possibilities of property interests—above the privacy and security in-

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[17] While evidence at the suppression hearing suggested that the inventory procedures were prompted by past thefts at the impound lot, the testimony refers to only two such thefts, see *ante*, at 366 n. 1, over an undisclosed period of time. There is no reason on this record to believe that the likelihood of pilferage at the lot was higher or lower than that on the street where respondent left his car with valuables in plain view inside. Moreover, the failure of the police to secure such frequently stolen items as the car's battery, suggests that the risk of loss from the impoundment was not in fact thought severe.

[18] In fact respondent claimed his possessions about five hours after his car was removed from the street. Record 39, 93.

terests protected by the Fourth Amendment. For this reason I dissent. On the remand it should be clear in any event that this Court's holding does not preclude a contrary resolution of this case or others involving the same issues under any applicable state law. See *Oregon* v. *Hass*, 420 U. S. 714, 726 (1975) (MARSHALL, J., dissenting).

Statement of MR. JUSTICE WHITE.

Although I do not subscribe to all of my Brother MARSHALL's dissenting opinion, particularly some aspects of his discussion concerning the necessity for obtaining the consent of the car owner, I agree with most of his analysis and conclusions and consequently dissent from the judgment of the Court.

Syllabus

# BUFFALO FORGE CO. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75–339. Argued March 24, 1976—Decided July 6, 1976

After petitioner employer's "office clerical-technical" (O&T) employees went on strike and picketed petitioner's plants during negotiations for a collective-bargaining contract, petitioner's production and maintenance (P&M) employees, who are represented by respondent unions, honored the O&T picket lines and stopped work in support of the sister unions representing the O&T employees. Petitioner then filed suit against respondents under § 301 (a) of the Labor Management Relations Act, claiming that the P&M employees' work stoppage violated the no-strike clause in the collective-bargaining contracts between petitioner and respondents, and that the question whether such work stoppage violated the no-strike clause was arbitrable under the grievance and arbitration provisions of the contracts for settling disputes over the interpretation and application of each contract. Petitioner sought damages, injunctive relief, and an order directing respondents to arbitrate such question. The District Court, concluding that the work stoppage was the result of P&M employees' engaging in a sympathy strike in support of the striking O&T employees, held that it was prohibited from issuing an injunction by § 4 of the Norris-LaGuardia Act because the P&M employees' strike was not an "arbitrable grievance" and hence was not within the "narrow" exception to the Norris-LaGuardia Act established in *Boys Markets* v. *Retail Clerks Union,* 398 U. S. 235. The Court of Appeals affirmed. *Held:* The District Court was not empowered to enjoin the P&M employees' sympathy strike pending the arbitrator's decision as to whether the strike was forbidden by the no-strike clause. Pp. 404–413.

(a) The strike was not over any dispute between respondents and petitioner that was even remotely subject to the arbitration provisions of the collective-bargaining contract, but was a sympathy strike in support of sister unions negotiating with petitioner with neither the purpose nor the effect of denying or evad-

ing an obligation to arbitrate or of depriving petitioner of its bargain. *Boys Markets, supra,* distinguished. Pp. 405–408.

(b) Nor was an injunction authorized solely because it was alleged that the sympathy strike violated the no-strike clause, since, although a § 301 suit may be brought against strikes that breach collective-bargaining contracts, this does not mean that federal courts may enjoin contract violations despite the Norris-LaGuardia Act. P. 409.

(c) While the issue whether the sympathy strike violated the no-strike clause was arbitrable, it does not follow that the District Court was empowered not only to order arbitration but also to enjoin the strike pending the arbitrator's decision, since if an injunction could so issue a court could enjoin any alleged breach of a collective-bargaining contract pending the exhaustion of the applicable grievance and arbitration procedures, thus cutting deeply into the Norris-LaGuardia Act's policy and making courts potential participants in a wide range of arbitrable disputes under many collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate, but for the purpose of preliminarily dealing with the factual and interpretative issues that are subjects for the arbitrator. Pp. 409–412.

517 F. 2d 1207, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and POWELL, JJ., joined, *post,* p. 413.

*Jeremy V. Cohen* argued the cause and filed briefs for petitioner.

*George H. Cohen* argued the cause for respondents. With him on the brief were *Elliot Bredhoff, Michael H. Gottesman, Robert M. Weinberg, Bernard Kleiman, Carl Frankel, Thomas P. McMahon, J. Albert Woll,* and *Laurence S. Gold.**

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*Briefs of *amici curiae* urging reversal were filed by *George R. Fearon* and *Charles E. Cooney, Jr.,* for Associated Industries of New York State, Inc.; by *Guy Farmer* and *William A. Gershuny* for Bituminous Coal Operators' Assn., Inc.; by *Lawrence B. Kraus,*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue for decision is whether a federal court may enjoin a sympathy strike pending the arbitrator's decision as to whether the strike is forbidden by the express no-strike clause contained in the collective-bargaining contract to which the striking union is a party.

I

The Buffalo Forge Co. (employer) operates three separate plant and office facilities in the Buffalo, N. Y., area. For some years production and maintenance (P&M) employees at the three locations have been represented by the United Steelworkers of America, AFL–CIO, and its Local Unions No. 1874 and No. 3732 (hereafter sometimes collectively the Union). The United Steelworkers is a party to the two separate collective-bargaining agreements between the locals and the employer. The contracts contain identical no-strike clauses,[1] as well as grievance and arbitration provisions

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*Richard B. Berman, G. Brockwel Heylin, William J. Curtin,* and *Harry A. Rissetto* for the Chamber of Commerce of the United States; and by *Richard D. Godown* for the National Association of Manufacturers of the United States.

[1] Section 14.b. of each agreement provides:

"There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity. The Union recognizes its possible liabilities for violation of this provision and will use its influence to see that work stoppages are prevented. Unsuccessful efforts by Union officers or Union representatives to prevent and terminate conduct prohibited by this paragraph, will not be construed as 'aid' or 'condonation' of such conduct and shall not result in any disciplinary actions against the Officers, committeemen or stewards involved." App. 16.

for settling disputes over the interpretation and application of each contract. The latter provide:

> "26. Should differences arise between the [employer] and any employee covered by this Agreement as to the meaning and application of the provisions of this Agreement, or should any trouble of any kind arise in the plant, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately [under the six-step grievance and arbitration procedure provided in sections 27 through 32]." [2]

Shortly before this dispute arose, the United Steelworkers and two other locals not parties to this litigation were certified to represent the employer's "office clerical-technical" (O&T) employees at the same three locations. On November 16, 1974, after several months of negotiations looking toward their first collective-bargaining agreement, the O&T employees struck and established picket lines at all three locations. On November 18, P&M employees at one plant refused to cross the O&T picket line for the day. Two days later, the employer learned that the P&M employees planned to stop work at all three plants the next morning. In telegrams to the Union, the employer stated its position that a strike by the P&M employees would violate the no-strike clause and offered to arbitrate any dispute

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[2] *Id.*, at 17. The final step in the six-part grievance procedure is provided for in § 32:

"In the event the grievance involves a question as to the meaning and application of the provisions of this Agreement, and has not been previously satisfactorily adjusted, it may be submitted to arbitration upon written notice of the Union or the Company." *Id.*, at 19.

which had led to the planned strike.[3] The next day, at the Union's direction, the P&M employees honored the O&T picket line and stopped work at the three plants. They did not return to work until December 16, the first regular working day after the District Court denied the employer's prayer for a preliminary injunction.

The employer's complaint under § 301 (a) of the Labor Management Relations Act, 1947,[4] filed in District Court on November 26, claimed the work stoppage was in violation of the no-strike clause. Contending in the alternative that the work strike was caused by a specific incident involving P&M truck drivers' refusal to follow a supervisor's instructions to cross the O&T picket line. and that the question whether the P&M employees' work stoppage violated the no-strike clause was itself arbitrable, the employer requested damages, a temporary restraining order and a preliminary injunction against the strike, and an order compelling the parties to submit

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[3] *Id.*, at 22–23. At oral argument before this Court, the parties disagreed whether the employer's telegrams were sufficient to submit the dispute to the contractual grievance procedures. Tr. of Oral Arg. 44–45, 48–50. The employer's complaint prayed for an order requiring arbitration of a dispute "relating to work performance of truck drivers or any other underlying dispute." App. 10. As far as the record indicates no grievance proceedings have taken place with respect to any aspect of the dispute. The Union apparently argued in the Court of Appeals that the employer was not entitled to an injunction because it failed to invoke the contractual grievance procedures. 517 F. 2d 1207, 1209 n. 4 (1975). Like the Court of Appeals, *ibid.*, we need not reach the issue under our disposition of the case.

[4] 61 Stat. 156, 29 U. S. C. § 185 (a). Section 301 (a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

any "underlying dispute" to the contractual grievance and arbitration procedures. The Union's position was that the work stoppage did not violate the no-strike clause.[5] It offered to submit that question to arbitration "on one day's notice," [6] but opposed the prayer for injunctive relief.

After denying the temporary restraining order and finding that the P&M work stoppage was not the result of the specific refusal to cross the O&T picket line, the District Court concluded that the P&M employees were engaged in a sympathy action in support of the striking O&T employees. The District Court then held itself forbidden to issue an injunction by § 4 of the Norris-LaGuardia Act [7] because the P&M employees' strike

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[5] District Court Tr. 57; Memorandum for Respondent in District Court 9, 13.

[6] *Id.*, at 9.

[7] Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 104, provides:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in,

was not over an "arbitrable grievance" and hence was not within the "narrow" exception to the Norris-LaGuardia Act established in *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970). 386 F. Supp. 405 (WDNY 1974).

On the employer's appeal from the denial of a preliminary injunction, 28 U. S. C. § 1292 (a)(1), the parties stipulated that the District Court's findings of fact were correct, that the Union had authorized and directed the P&M employees' work stoppage, that the O&T employees' strike and picket line were bona fide, primary, and legal, and that the P&M employees' work stoppage, though ended, might "be resumed at any time in the near future at the direction of the International Union, or otherwise." [8]

The Court of Appeals affirmed. It held that enjoin-

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any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act."

[8] App. 25. The presence of an existing dispute makes this a live controversy despite the P&M employees' return to the job. See *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115, 124–125 (1974); *Bus Employees* v. *Missouri*, 374 U. S. 74, 77–78 (1963). The collective-bargaining agreements in effect when this action arose have expired, but the parties have stipulated, App. 25, that they govern resolution of this dispute. On appeal the employer did not challenge the District Court's finding that the P&M employees' work stoppage was not, at least in part, a protest over truck driving assignments. 517 F. 2d, at 1211 n. 7.

ing this strike, which was not "over a grievance which the union has agreed to arbitrate," was not permitted by the *Boys Markets* exception to the Norris-LaGuardia Act. 517 F. 2d 1207, 1210 (CA2 1975). Because the Courts of Appeals are divided on the question whether such a strike may be enjoined,[9] we granted the employer's petition for a writ of certiorari, 423 U. S. 911 (1975), and now affirm the judgment of the Court of Appeals.

## II

As a preliminary matter, certain elements in this case are not in dispute. The Union has gone on strike not by

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[9] The decision of the Second Circuit in this case is in accord with decisions of the Fifth and Sixth Circuits, *Amstar Corp.* v. *Meat Cutters*, 468 F. 2d 1372 (CA5 1972); *Plain Dealer Pub. Co.* v. *Cleveland Typographical Union*, 520 F. 2d 1220 (CA6 1975), cert. denied, *post*, p. 909; see *United States Steel Corp.* v. *Mine Workers*, 519 F. 2d 1236 (CA5 1975), reh. denied, 526 F. 2d 376 (1976), cert. denied, *post*, p. 910, but at odds with decisions of the Third, Fourth, and Eighth Circuits, *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs*, 502 F. 2d 321 (CA3) (en banc), cert. denied, 419 U. S. 1049 (1974); *Island Creek Coal Co.* v. *Mine Workers*, 507 F. 2d 650 (CA3), cert. denied, 423 U. S. 877 (1975); *Armco Steel Corp.* v. *Mine Workers*, 505 F. 2d 1129 (CA4 1974), cert. denied, 423 U. S. 877 (1975); *Pilot Freight Carriers, Inc.* v. *Teamsters*, 497 F. 2d 311 (CA4), cert. denied, 419 U. S. 869 (1974); *Wilmington Shipping Co.* v. *Longshoremen*, 86 L. R. R. M. 2846 (CA4), cert. denied, 419 U. S. 1022 (1974); *Monongahela Power Co.* v. *Electrical Workers*, 484 F. 2d 1209 (CA4 1973); *Valmac Industries* v. *Food Handlers*, 519 F. 2d 263 (CA8 1975), cert. granted, vacated and remanded, *post*, p. 906; *Associated Gen. Contractors* v. *Operating Engineers*, 519 F. 2d 269 (CA8 1975). The Seventh Circuit has adopted an intermediate position. *Hyster Co.* v. *Independent Towing Assn.*, 519 F. 2d 89 (1975), cert. denied *sub nom. Hyster Co.* v. *Employees Assn. of Kewanee*, *post*, p. 910; *Gary Hobart Water Corp.* v. *NLRB*, 511 F. 2d 284, cert. denied, 423 U. S. 925 (1975). But cf. *Inland Steel Co.* v. *Mine Workers*, 505 F. 2d 293 (1974).

reason of any dispute it or any of its members has with the employer, but in support of other local unions of the same international organization, that were negotiating a contract with the employer and were out on strike. The parties involved here are bound by collective-bargaining contracts each containing a no-strike clause which the Union claims does not forbid sympathy strikes. The employer has the other view, its complaint in the District Court asserting that the work stoppage violated the no-strike clause. Each of the contracts between the parties also has an arbitration clause broad enough to reach not only disputes between the Union and the employer about other provisions in the contracts but also as to the meaning and application of the no-strike clause itself. Whether the sympathy strike the Union called violated the no-strike clause, and the appropriate remedies if it did, are subject to the agreed-upon dispute-settlement procedures of the contracts and are ultimately issues for the arbitrator. *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593 (1960). The employer thus was entitled to invoke the arbitral process to determine the legality of the sympathy strike and to obtain a court order requiring the Union to arbitrate if the Union refused to do so. *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368 (1974). Furthermore, were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision. *Steelworkers* v. *Enterprise Corp.*, *supra.*

The issue in this case arises because the employer not only asked for an order directing the Union to arbitrate but prayed that the strike itself be enjoined pending

arbitration and the arbitrator's decision whether the strike was permissible under the no-strike clause. Contrary to the Court of Appeals, the employer claims that despite the Norris-LaGuardia Act's ban on federal-court injunctions in labor disputes the District Court was empowered to enjoin the strike by § 301 of the Labor Management Relations Act as construed by *Boys Markets* v. *Retail Clerks Union, supra.* This would undoubtedly have been the case had the strike been precipitated by a dispute between union and management that was subject to binding arbitration under the provisions of the contracts. In *Boys Markets,* the union demanded that supervisory employees cease performing tasks claimed by the union to be union work. The union struck when the demand was rejected. The dispute was of the kind subject to the grievance and arbitration clauses contained in the collective-bargaining contract, and it was also clear that the strike violated the no-strike clause accompanying the arbitration provisions. The Court held that the union could be enjoined from striking over a dispute which it was bound to arbitrate at the employer's behest.

The holding in *Boys Markets* was said to be a "narrow one," dealing only with the situation in which the collective-bargaining contract contained mandatory grievance and arbitration procedures. *Id.,* at 253. "[F]or the guidance of the district courts in determining whether to grant injunctive relief," the Court expressly adopted the principles enunciated in the dissent in *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, 228 (1962), including the proposition that

> " '[w]hen a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may

> issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike.'" 398 U. S., at 254 (emphasis in *Sinclair*).

The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties. Only to that extent was it held necessary to accommodate § 4 of the Norris-LaGuardia Act to § 301 of the Labor Management Relations Act and to lift the former's ban against the issuance of injunctions in labor disputes. Striking over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute. The *quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery. Even in the absence of an express no-strike clause, an undertaking not to strike would be implied where the strike was over an otherwise arbitrable dispute. *Gateway Coal Co.* v. *Mine Workers, supra; Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). Otherwise, the employer would be deprived of his bargain and the policy of the labor statutes to implement private resolution of disputes in a manner agreed upon would seriously suffer.

*Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures

provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of its bargain. Thus, had the contract not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case. *Gateway Coal Co.* v. *Mine Workers, supra,* at 382.[10]

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[10] To the extent that the Court of Appeals, 517 F. 2d, at 1211, and other courts, *Island Creek Coal Co.* v. *Mine Workers,* 507 F. 2d, at 653–654; *Armco Steel Corp.* v. *Mine Workers,* 505 F. 2d, at 1132–1133; *Amstar Corp.* v. *Meat Cutters,* 337 F. Supp. 810, 815 (ED La.), rev'd on other grounds, 468 F. 2d 1372 (CA5 1972); *Inland Steel Co.* v. *Mine Workers,* 505 F. 2d, at 299–300, have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong.

*Gateway Coal Co.* v. *Mine Workers* itself furnishes no additional support for the employer here. In that case, after finally concluding that the dispute over which the strike occurred was arbitrable within the meaning of the arbitration clause contained in a contract which did not also contain a no-strike clause, the Court held that the contract implied an undertaking not to strike, based on *Teamsters* v. *Lucas Flour Co.,* 369 U. S. 95 (1962), and permitted an injunction against the strike based on the principles of *Boys Markets.* The critical determination in *Gateway* was that the dispute was arbitrable. This was the fulcrum for finding a duty not to strike over that dispute and for enjoining the strike the union had called. Of course, the authority to enjoin the work stoppage depended on "whether the union was under a contractual duty not to strike." 414 U. S., at 380. But that statement was made only preparatory to finding an implied duty not to strike. The strike was then enjoined only because it was over an arbitrable dispute. The same precondition to a strike injunction also existed in *Boys Markets.* Absent that factor, neither case furnishes the authority to enjoin a strike solely

Nor was the injunction authorized solely because it was alleged that the sympathy strike called by the Union violated the express no-strike provision of the contracts. Section 301 of the Act assigns a major role to the courts in enforcing collective-bargaining agreements, but aside from the enforcement of the arbitration provisions of such contracts, within the limits permitted by *Boys Markets,* the Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act. In the course of enacting the Taft-Hartley Act, Congress rejected the proposal that the Norris-LaGuardia Act's prohibition against labor-dispute injunctions be lifted to the extent necessary to make injunctive remedies available in federal courts for the purpose of enforcing collective-bargaining agreements. See *Sinclair Refining Co.* v. *Atkinson, supra,* at 205–208, and 216–224 (dissenting opinion). The allegation of the complaint that the Union was breaching its obligation not to strike did not in itself warrant an injunction. As was stated in the *Sinclair* dissent embraced in *Boys Markets:*

> "[T]here is no general federal anti-strike policy; and although a suit may be brought under § 301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail." 370 U. S., at 225.

The contracts here at issue, however, also contained grievance and arbitration provisions for settling disputes over the interpretation and application of the provisions of the contracts, including the no-strike clause. That

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because it is claimed to be in breach of contract and because this claim is itself arbitrable.

clause, like others, was subject to enforcement in accordance with the procedures set out in the contracts. Here the Union struck, and the parties were in dispute whether the sympathy strike violated the Union's no-strike undertaking. Concededly, that issue was arbitrable. It was for the arbitrator to determine whether there was a breach, as well as the remedy for any breach, and the employer was entitled to an order requiring the Union to arbitrate if it refused to do so. But the Union does not deny its duty to arbitrate; in fact, it denies that the employer ever demanded arbitration. However that may be, it does not follow that the District Court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator, despite the express prohibition of § 4 (a) of the Norris-LaGuardia Act against injunctions prohibiting any person from "[c]easing or refusing to perform any work or to remain in any relation of employment." If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 4. The court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact,[11] interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo, or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process. This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective-

[11] See Fed. Rule Civ. Proc. 52 (a).

bargaining contracts,[12] not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets,* but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act.

This is not what the parties have bargained for. Surely it cannot be concluded here, as it was in *Boys Markets,* that such injunctions pending arbitration are essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract. As is typical, the agreements in this case outline the prearbitration settlement procedures and provide that if the grievance "has not been . . . satisfactorily adjusted," arbitration may be had. Nowhere do they provide for coercive action of any kind, let alone judicial injunctions, short of the terminal decision of the arbitrator. The parties have agreed to submit to grievance procedures and arbitrate, not to litigate. They have not contracted for a judicial preview of the facts and the law.[13] Had they anticipated additional regulation of their relationships pending arbitration, it seems very doubtful that they would have resorted to litigation rather than to private arrangements. The unmistakable policy of Congress stated in § 203 (d), 29 U. S. C. § 173 (d), is: "Final adjustment by a method agreed

[12] This could embroil the district courts in massive preliminary injunction litigation. In 1972, the most recent year for which comprehensive data have been published, more than 21 million workers in the United States were covered under more than 150,000 collective-bargaining agreements. Bureau of Labor Statistics, Directory of National Unions and Employee Associations 87–88 (1973).

[13] Whether a district court's preview led it to grant or to refuse the requested injunction pending arbitration, its order, as in this case, would be appealable, 28 U. S. C. § 1292 (a)(1).

upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *Gateway Coal Co.* v. *Mine Workers,* 414 U. S., at 377. But the parties' agreement to adjust or to arbitrate their differences themselves would be eviscerated if the courts for all practical purposes were to try and decide contractual disputes at the preliminary injunction stage.

The dissent suggests that injunctions should be authorized in cases such as this at least where the violation, in the court's view, is clear and the court is sufficiently sure that the parties seeking the injunction will win before the arbitrator. But this would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly pre-empted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted. Injunctions against strikes, even temporary injunctions, very often permanently settle the issue; and in other contexts time and expense would be discouraging factors to the losing party in court in considering whether to relitigate the issue before the arbitrator.

With these considerations in mind, we are far from concluding that the arbitration process will be frustrated unless the courts have the power to issue interlocutory injunctions pending arbitration in cases such as this or in others in which an arbitrable dispute awaits decision. We agree with the Court of Appeals that there is no necessity here, such as was found to be the case in *Boys Markets,* to accommodate the policies of the Norris-LaGuardia Act to the requirements of § 301 by empowering

the District Court to issue the injunction sought by the employer.

The judgment of the Court of Appeals is affirmed.

*So ordered.*

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

A contractual undertaking not to strike is the union's normal *quid pro quo* for the employer's undertaking to submit grievances to binding arbitration. The question in this case is whether that *quid pro quo* is severable into two parts—one which a federal court may enforce by injunction and another which it may not.

Less than three years ago all eight of my Brethren joined in an opinion which answered that question quite directly by stating that whether a district court has authority to enjoin a work stoppage "depends on whether the union was under a contractual duty not to strike." *Gateway Coal Co.* v. *Mine Workers,* 414 U. S. 368, 380.[1]

The Court today holds that only a part of the union's *quid pro quo* is enforceable by injunction.[2] The prin-

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[1] The Court read *Boys Markets* v. *Retail Clerks Union,* 398 U. S. 235, to conclude that "§ 301 (a) empowers a federal court to enjoin violations of a contractual duty not to strike." 414 U. S., at 381. There was no dissent from that proposition.

[2] The enforceable part of the no-strike agreement is the part relating to a strike "over an arbitrable dispute." In *Gateway Coal,* however, my Brethren held that the District Court had properly entered an injunction that not only terminated a strike pending an arbitrator's decision of an underlying safety dispute, but also "prospectively required both parties to abide by his resolution of the controversy." *Id.,* at 373. A strike in defiance of an arbitrator's award would not be "over an arbitrable dispute"; nevertheless, the Court today recognizes the propriety of an injunction against such a strike. *Ante,* at 405.

cipal bases for the holding are (1) the Court's literal interpretation of the Norris-LaGuardia Act; and (2) its fear that the federal judiciary would otherwise make a "massive" entry into the business of contract interpretation heretofore reserved for arbitrators. The first argument has been rejected repeatedly in cases in which the central concerns of the Norris-LaGuardia Act were not implicated. The second is wholly unrealistic [3] and was implicitly rejected in *Gateway Coal* when the Court held that "a substantial question of contractual interpretation" was a sufficient basis for federal equity jurisdiction. 414 U. S., at 384. That case held that an employer might enforce a somewhat ambiguous *quid pro quo;* today the Court holds that a portion of the *quid pro quo* is unenforceable no matter how unambiguous it may be. With all respect, I am persuaded that a correct application of the reasoning underlying the landmark decision in *Boys Markets* v. *Retail Clerks Union,* 398 U. S. 235, requires a different result.

In order to explain my conclusion adequately, I first review the rationale of *Boys Markets* and then relate that rationale to the question presented by this case.

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[3] The Court's expressed concern that enforcing an unambiguous no-strike clause by enjoining a sympathy strike might "embroil the district courts in massive preliminary injunction litigation," *ante,* at 411 n. 12, is supposedly supported by the fact that 21 million American workers were covered by over 150,000 collective-bargaining agreements in 1972. These figures give some idea of the potential number of grievances that may arise, each of which could lead to a strike which is plainly enjoinable under *Boys Markets.* These figures do not shed any light on the number of sympathy strikes which may violate an express no-strike commitment. In the past several years over a dozen such cases have arisen. See *ante,* at 404 n. 9. Future litigation of this character would, of course, be minimized by clarifying amendments to existing no-strike clauses.

## I

Eight years before *Boys Markets*, the Court squarely held that the Norris-LaGuardia Act precluded a federal district court from enjoining a strike in breach of a no-strike obligation under a collective-bargaining agreement requiring arbitration of the underlying dispute. *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195.[4] To authorize the injunction in *Boys Markets*, the Court was therefore required to overrule a decision directly in point as well as to harmonize its holding with the language of the Norris-LaGuardia Act. The Court found several reasons that compelled this result.

First, the Court noted that injunctions enforcing a contractual commitment to arbitrate a grievance were not among the abuses against which the Norris-LaGuardia Act was aimed.[5] This, of course, is clear from the declaration of policy in the Norris-LaGuardia Act itself,[6]

[4] One week after the decision in *Sinclair*, the Court decided *Teamsters* v. *Yellow Transit*, 370 U. S. 711, by *per curiam* order citing only *Sinclair*. The dissenters in *Sinclair*, whose position was substantially adopted in *Boys Markets*, concurred in *Yellow Transit* because "the collective bargaining agreement involved in this case does not bind either party to arbitrate any dispute." 370 U. S., at 711–712. In this case, as in those cases, it does not follow from the availability of an injunction when the agreement contains a mandatory arbitration clause that one may issue when it does not. See n. 20, *infra*.

[5] Referring to the holding in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, the Court stated that it had "rejected the contention that the anti-injunction proscriptions of the Norris-LaGuardia Act prohibited this type of relief, noting that a refusal to arbitrate was not 'part and parcel of the abuses against which the Act was aimed,' *id.*, at 458, and that the Act itself manifests a policy determination that arbitration should be encouraged. See 29 U. S. C. § 108." 398 U. S., at 242 (footnote omitted).

[6] Section 2 of the Act provides:

"In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such

which plainly identifies a primary concern with protecting labor's ability to organize and to bargain collectively. It was the history of injunctions against strike activity in furtherance of union organization, recognition, and collective bargaining, rather than judicial enforcement of collective-bargaining agreements, that led to the enactment of the Norris-LaGuardia Act in 1932.[7] As the

jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted." 47 Stat. 70, 29 U. S. C. § 102.

[7] In *Boys Markets* the Court quoted with approval the following statement by the neutral members of the Special *Atkinson-Sinclair* Committee of the American Bar Association Labor Relations Law Section:

"'Any proposal which would subject unions to injunctive relief must take account of the Norris-LaGuardia Act and the opposition expressed in that Act to the issuing of injunctions in labor disputes. Nevertheless, the reasons behind the Norris-LaGuardia Act seem scarcely applicable to the situation . . . [in which a strike in violation of a collective-bargaining agreement is enjoined]. The Act was passed primarily because of widespread dissatisfaction with the tendency of judges to enjoin concerted activities in accordance with "doctrines of tort law which made the lawfulness of a strike depend upon judicial views of social and economic policy." [Citation

Court observed in *Boys Markets,* the climate of labor relations has been transformed since the passage of the Norris-LaGuardia Act, 398 U. S., at 250–251, and "the central purpose of the Norris-LaGuardia Act to foster the growth and viability of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration." *Id.,* at 252–253 (footnote omitted). It is equally clear that the present case does not implicate the central concerns of the Norris-LaGuardia Act; for it also deals with the enforceability of a collective-bargaining agreement rather than with the process by which such agreements are negotiated and formed.

Second, the Court emphasized the relevance of the subsequently enacted statute enlarging the jurisdiction of federal courts to grant relief in labor disputes. Section 301 (a) of the Labor Management Relations Act expressly authorized federal jurisdiction of suits for violation of collective-bargaining agreements without respect to the amount in controversy or the citizenship of the parties. That provision was viewed as supporting the collective-bargaining process, for employers would have more incentive to enter into agreements with un-

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omitted.] Where an injunction is used against a strike in breach of contract, the union is not subjected in this fashion to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed. Moreover, where the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose.'" 398 U. S., at 253 n. 22, quoting Report of Special *Atkinson-Sinclair* Committee, American Bar Association Labor Relations Law Section—Proceedings 242 (1963).

ions if they were mutually enforceable than if they were not. With specific reference to the value of an enforceable commitment to arbitrate grievance disputes, *Boys Markets* emphasized the importance of the union's no-strike commitment as the *quid pro quo* for the employer's undertaking to submit disputes to arbitration.[8] And in many collective-bargaining agreements, the em-

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[8] "As we have previously indicated, a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration. See *Textile Workers Union* v. *Lincoln Mills, supra,* at 455. Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." 398 U. S., at 247–248 (footnotes omitted). Accord, *William E. Arnold Co.* v. *Carpenters,* 417 U. S. 12, 19; *Gateway Coal,* 414 U. S., at 381–382, and n. 14.

The Court relied upon another statement by the neutral members of the Special *Atkinson-Sinclair* Committee:

"'Under existing laws, employers may maintain an action for damages resulting from a strike in breach of contract and may discipline the employees involved. In many cases, however, neither of these alternatives will be feasible. Discharge of the strikers is often inexpedient because of a lack of qualified replacements or because of the adverse effect on relationships within the plant. The damage remedy may also be unsatisfactory because the employer's losses are often hard to calculate and because the employer may hesitate to exacerbate relations with the union by bringing a damage action. Hence, injunctive relief will often be the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor policy.'" 398 U. S., at 248–249, n. 17, quoting Report of Special *Atkinson-Sinclair* Committee, *supra,* n. 7, at 242.

ployer has agreed to mandatory arbitration only in exchange for a no-strike clause that extends beyond strikes over arbitrable disputes.[9] It is therefore simply wrong to argue, as the Court does, that the strike in this case could not have had the purpose or effect "of depriving the employer of his bargain." *Ante,* at 408. If the sympathy strike in this case violates the Union's no-strike pledge, the same public interest in an enforceable *quid pro quo* is present here as in *Boys Markets.* The Union contends, however, that this strike did not violate its contract, or at least, that it has not yet been decided that it does. Accordingly, this portion of the rationale of *Boys Markets* applies only to the extent of the certainty that the sympathy strike falls within the no-strike clause.

Third, the Court relied upon a line of cases in which the language of the Norris-LaGuardia Act had not been given controlling effect. Several decisions had held that the federal courts could issue injunctions in labor disputes to compel employers and unions to fulfill their obligations under the Railway Labor Act,[10] notwithstanding "the earlier and more general provisions of the Norris-LaGuardia Act." *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 563. Accord, *Railroad Trainmen* v. *Howard,* 343 U. S. 768, 774; *Graham* v. *Locomotive Firemen,* 338 U. S. 232, 237–240. These decisions culminated in *Railroad Trainmen* v. *Chicago, R. & I. R. Co.,* 353 U. S. 30, 39–42, which held that a federal court could enjoin a strike by a railroad union over a dispute subject to mandatory arbitration under the Railway Labor Act. The Norris-LaGuardia Act was held not to bar the injunction because of "the need to accommodate

[9] Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 757–760 (1973).

[10] 44 Stat. 577, as amended, 48 Stat. 1185, 45 U. S. C. §§ 151–188.

two statutes, when both were adopted as a part of a pattern of labor legislation." *Id.*, at 42. See *Chicago & N. W. R. Co.* v. *Transportation Union*, 402 U. S. 570, 581–584. In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, the Court relied on the same rationale to hold that § 301 (a) of the Labor Management Relations Act conferred jurisdiction upon the district courts to grant the union specific enforcement of an arbitration clause in a collective-bargaining agreement. Speaking for the Court, Mr. Justice Douglas noted that the legislative history of § 301 (a) "is somewhat cloudy and confusing" but that the conference report had stated that once the parties had made a collective-bargaining agreement, its enforcement " 'should be left to the usual processes of the law.' " 353 U. S., at 452, quoting H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 42 (1947). He added:

> "Both the Senate and the House took pains to provide for 'the usual processes of the law' by provisions which were the substantial equivalent of § 301 (a) in its present form. Both the Senate Report and the House Report indicate a primary concern that unions as well as employees should be bound to collective bargaining contracts. But there was also a broader concern—a concern with a procedure for making such agreements enforceable in the courts by either party. At one point the Senate Report, [S. Rep. No. 105, 80th Cong., 1st Sess. (1947),] p. 15, states, 'We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was "to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made . . . ."' "

"Congress was also interested in promoting collective bargaining that ended with agreements not to strike. The Senate Report, *supra*, p. 16 states:

" 'If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

" 'Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.'

"Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' *Id.*, p. 15. As stated in the House Report, [H. R. Rep. No. 245, 80th Cong., 1st Sess. (1947),] p. 6, the new provision 'makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts.' To repeat, the Senate Report, *supra*, p. 17, summed up the philosophy of § 301 as follows: 'Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step.

> It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.'
>
> "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." 353 U. S., at 453–455 (footnote omitted).

With direct reference to the argument that jurisdiction was withdrawn by the Norris-LaGuardia Act, Mr. Justice Douglas pointed out that even though a literal reading of that statute might bring the dispute within its terms, there was no policy justification for restricting § 301 (a) to damages suits and subjecting specific performance of an agreement to arbitrate grievance disputes to the inapposite provisions of that Act. 353 U. S., at 458.

These decisions and the holding of *Boys Markets* itself, make clear that the literal wording of the Norris-LaGuardia Act is not an insuperable obstacle to specific enforcement of a no-strike commitment in accordance with "the usual processes of the law." [11]

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[11] The Court relies upon the fact that when Congress enacted the Labor Management Relations Act, it considered and rejected a proposal that would have rendered the Norris-LaGuardia Act inapplicable in any proceeding involving the violation of a collective-bargaining agreement. *Ante*, at 409. The argument that congressional rejection of a broad repeal of the Norris-LaGuardia Act precluded accommodation of the two Acts was fully canvassed in *Sinclair*, where it was accepted by the Court and rejected by the dissenters, whose views were later substantially adopted by the Court

Fourth, *Boys Markets* stressed one anomalous consequence of *Sinclair*. In many state jurisdictions a no-strike clause could be enforced by injunction. The enactment of § 301 (a), which was intended to provide an additional forum for the enforcement of collective-bargaining agreements,[12] made it possible to remove state litigation to the federal forum,[13] and then to foreclose any injunctive relief by reliance on the Norris-LaGuardia Act. 398 U. S., at 243–247. This incongruous result could not easily be squared with the intent of Congress in § 301 (a) to confer concurrent jurisdiction upon the state courts. That argument applies with equal force to this case.

Finally, *Boys Markets* emphasized the strong federal policy favoring settlement of labor disputes by arbitration. 398 U. S., at 242–243. Since, apart from statutory authorization, this method of settling disputes is available only when authorized by agreement between the parties, the policy favoring arbitration equally favors the making of enforceable agreements to arbitrate. For that reason, *Boys Markets* also emphasized the importance of ensuring enforceability of the union's *quid pro quo* for the employer's agreement to submit grievance disputes to arbitration. *Id.*, at 247–249, 251–253. A sympathy strike in violation of a no-strike clause does

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in *Boys Markets*. *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 204–210; *id.*, at 220–225 (BRENNAN, J., dissenting); *Boys Markets*, 398 U. S., at 249. The Court today nevertheless revives this argument, candidly citing the overruled decision in *Sinclair*, and arguing, as did the opinion in that case, that any further accommodation between the Labor Management Relations Act and the Norris-LaGuardia Act will result in wholesale enforcement of no-strike clauses by injunction. See *Sinclair*, *supra*, at 209–210.

[12] *William E. Arnold Co.* v. *Carpenters*, 417 U. S., at 20; *Dowd Box Co.* v. *Courtney*, 368 U. S. 502.

[13] *Avco Corp.* v. *Aero Lodge 735*, 390 U. S. 557.

not directly frustrate the arbitration process, but if the clause is not enforceable against such a strike, it does frustrate the more basic policy of motivating employers to agree to binding arbitration by giving them an effective "assurance of uninterrupted operation during the term of the agreement." [14] This portion of *Boys Markets* is therefore not entirely applicable to the present case. Accordingly, it is essential to consider the importance of arbitration to the holding in *Boys Markets*. To that question I now turn.

## II

The *Boys Markets* decision protects the arbitration process. A court is authorized to enjoin a strike over a grievance which the parties are contractually bound to arbitrate, but that authority is conditioned upon a finding that the contract does so provide, that the strike is in violation of the agreement, and further that the issuance of an injunction is warranted by ordinary principles of equity. *Id.*, at 254.[15] These conditions plainly stated in *Boys Markets* demonstrate that the interest in protecting the arbitration process is not simply an end in

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[14] *Lincoln Mills*, 353 U. S., at 454. As the Court reminded us in *Gateway Coal*, " 'the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.' " 414 U. S., at 379, quoting *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 582.

[15] *Gateway Coal* later extended *Boys Markets* to an injunction enforcing an implied no-strike clause coextensive with the arbitration clause in a case in which the question of arbitrability was itself a "substantial question of contractual interpretation." 414 U. S., at 380–384. It did not alter the fundamental preconditions of a *Boys Markets* injunction: a contractual commitment to final and binding arbitration, a corresponding no-strike commitment, and satisfaction of the ordinary principles of equity. *Id.*, at 380–384, 387–388.

itself which exists at large and apart from other fundamental aspects of our national labor policy.

On the one hand, an absolute precondition of any *Boys Markets* injunction is a contractual obligation. A court may not order arbitration unless the parties have agreed to that process; nor can the court require the parties to accept an arbitrator's decision unless they have agreed to be bound by it. *Id.*, at 253–255. Accord, *Gateway Coal*, 414 U. S., at 374, 380–384. If the union reserves the right to resort to self-help at the conclusion of the arbitration process, that agreement must be respected.[16] The court's power is limited by the contours of the agreement between the parties.[17]

On the other hand, the arbitration procedure is not merely an exercise; it performs the important purpose of determining what the underlying agreement actually means as applied to a specific setting. If the parties have agreed to be bound by the arbitrator's decision, the reasons which justify an injunction against a strike that would impair his ability to reach a decision must equally justify an injunction requiring the parties to abide by a decision that a strike is in violation of the no-strike clause.[18] The arbitration mechanism would hardly retain its respect as a method of resolving disputes if the

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[16] *Associated Gen. Contractors of Illinois* v. *Illinois Conference of Teamsters*, 454 F. 2d 1324 (CA7 1972).

[17] In particular, an implied no-strike clause does not extend to sympathy strikes. See *ante*, at 407–408, and n. 10.

[18] The Court recognizes that an injunction may issue to enforce an arbitrator's decision that a strike is in violation of the no-strike clause. *Ante*, at 405. See *Longshoremen* v. *Marine Trade Assn.*, 389 U. S. 64, 77–79 (Douglas, J., concurring in part and dissenting in part); *New Orleans S. S. Assn.* v. *General Longshore Workers*, 389 F. 2d 369 (CA5 1968), cert. denied, 393 U. S. 828; Dunau, Three Problems in Labor Arbitration, 55 Va. L. Rev. 427, 473–477 (1969).

end product of the process had less significance than the process itself.

The net effect of the arbitration process is to remove completely any ambiguity in the agreement as it applies to an unforeseen, or undescribed, set of facts. But if the specific situation is foreseen and described in the contract itself with such precision that there is no need for interpretation by an arbitrator, it would be reasonable to give the same legal effect to such an agreement prior to the arbitrator's decision.[19] In this case, the question whether the sympathy strike violates the no-strike clause is an arbitrable issue. If the court had the benefit of an arbitrator's resolution of the issue in favor of the employer, it could enforce that decision just as it could require the parties to submit the issue to arbitration. And if the agreement were so plainly unambiguous that there could be no bona fide issue to submit to the arbitrator, there must be the same authority to enforce the parties' bargain pending the arbitrator's final decision.[20]

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[19] The Court asserts that interim relief should not be granted unless the collective-bargaining agreement expressly provides for it. *Ante*, at 411. The same argument could have been made against the holding in *Boys Markets*, since *Sinclair* left the parties free to endow the arbitrator with power to order an end to strikes over arbitrable grievances. Indeed, the union members of the Special Atkinson-Sinclair Committee suggested such contractual provisions as an alternative to abandonment of *Sinclair*. Report of Special *Atkinson-Sinclair* Committee, *supra*, n. 7, at 239.

[20] Cf. *Stokely-Van Camp, Inc.* v. *Thacker*, 394 F. Supp. 715, 719–720 (WD Wash. 1975); Note, The Applicability of *Boys Markets* Injunctions to Refusals to Cross a Picket Line, 76 Col. L. Rev. 113, 136–140 (1976). It is not necessary to hold that an injunction may issue if the scope of the no-strike clause is not a clearly arbitrable issue. If the agreement contains no arbitration clause whatsoever, enforcement of the no-strike clause would not promote arbitration by encouraging employers to agree to an arbitration clause in exchange for a no-strike clause. Furthermore, even

The Union advances three arguments against this conclusion: (1) that interpretation of the collective-bargaining agreement is the exclusive province of the arbitrator; (2) that an injunction erroneously entered pending arbitration will effectively deprive the union of the right to strike before the arbitrator can render his decision; and (3) that it is the core purpose of the Norris-LaGuardia Act to eliminate the risk of an injunction against a lawful strike.[21] Although I acknowledge the force of these arguments, I think they are insufficient to take this case outside the rationale of *Boys Markets.*

The *Steelworkers* trilogy [22] establishes that a collective-bargaining agreement submitting all questions of contract interpretation to the arbitrator deprives the courts of

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if the agreement contains an arbitration clause, but the clause does not clearly extend to the question whether a strike violates the agreement, then the parties' commitment to enforcement of the no-strike clause through enforcement of the arbitrator's final decision also remains unclear.

[21] The Union also argues that an injunction should be barred because the party seeking arbitration is usually required to accept the condition of which he complains pending the decision of the arbitrator. The employer normally receives the benefit of this rule, since it is the union that initiates most grievances. The Union contends that fairness dictates that it receive the same benefit pending the outcome of employer grievances. However, the rule has its origins in the need for production to go forward under the employer's control pending clarification of the agreement through arbitration. See Feller, *supra*, n. 9, at 737–740. This justification hardly supports, but rather undermines, the Union's position.

The Court advances the same argument as a threat of "massive preliminary injunction litigation" by both employers and unions over all arbitrable disputes. *Ante*, at 411 n. 12. This argument simply ignores the special status of the no-strike clause as the *quid pro quo* of the arbitration clause.

[22] *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567–568; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S., at 582–583; *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593, 597–599.

almost all power to interpret the agreement to prevent submission of a dispute to arbitration or to refuse enforcement of an arbitrator's award. *Boys Markets* itself repeated the warning that it was not for the courts to usurp the functions of the arbitrator. 398 U. S., at 242–243. And *Gateway Coal* held that an injunction may issue to protect the arbitration process even if a "substantial question of contractual interpretation" must be answered to determine whether the strike is over an arbitrable grievance. 414 U. S., at 382–384. In each of these cases, however, the choice was between interpretation of the agreement by the court or interpretation by the arbitrator; a decision that the dispute was not arbitrable, or not properly arbitrated, would have precluded an interpretation of the agreement according to the contractual grievance procedure. In the present case, an interim determination of the no-strike question by the court neither usurps nor precludes a decision by the arbitrator. By definition, issuance of an injunction pending the arbitrator's decision does not supplant a decision that he otherwise would have made. Indeed, it is the ineffectiveness of the damages remedy for strikes pending arbitration that lends force to the employer's argument for an injunction.[23] The court does not oust the arbitrator of his proper function but fulfills a role that he never served.

The Union's second point, however, is that the arbitrator will rarely render his decision quickly enough to prevent an erroneously issued injunction from effectively depriving the union of its right to strike. The Union relies particularly upon decisions of this Court that recognize that even a temporary injunction can quickly end a strike.[24] But this argument demonstrates only that

[23] See n. 8, *supra*.

[24] *Construction Laborers* v. *Curry*, 371 U. S. 542, 550; *Liner* v.

arbitration, to be effective, must be prompt, not that the federal courts must be deprived entirely of jurisdiction to grant equitable relief. Denial of an injunction when a strike violates the agreement may have effects just as devastating to an employer as the issuance of an injunction may have to the union when the strike does not violate the agreement. Furthermore, a sympathy strike does not directly further the economic interests of the members of the striking local or contribute to the resolution of any dispute between that local, or its members, and the employer.[25] On the contrary, it is the source of a new dispute which, if the strike goes forward, will impose costs on the strikers, the employer, and the public without prospect of any direct benefit to any of these parties. A rule that authorizes postponement of a sympathy strike pending an arbitrator's clarification of the no-strike clause will not critically impair the vital interests of the striking local even if the right to strike is upheld, and will avoid the costs of interrupted production if the arbitrator concludes that the no-strike clause applies.

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*Jafco, Inc.*, 375 U. S. 301, 308. *Curry* held that a judgment of a State Supreme Court requiring issuance of a temporary injunction against labor picketing was final and hence reviewable in this Court. *Liner* held that a state-court injunction against labor picketing was reviewable in this Court despite a claim of mootness arising from completion of construction at the picketed site. In both cases, the claim on the merits was that state-court jurisdiction was pre-empted by federal law. The finality and mootness holdings in each case rested partly on the need to protect federal labor policy from frustration by temporary injunctions erroneously issued by state courts. It was at this point that the final effect of a temporary labor injunction became relevant.

[25] In this case the sympathy strike is in support of a strike by other local unions of the same international. The parties, however, attach no significance to that fact.

Finally, the Norris-LaGuardia Act cannot be interpreted to immunize the union from all risk of an erroneously issued injunction. *Boys Markets* itself subjected the union to the risk of an injunction entered upon a judge's erroneous conclusion that the dispute was arbitrable and that the strike was in violation of the no-strike clause, 398 U. S., at 254. *Gateway Coal* subjected the union to a still greater risk, for the court there entered an injunction to enforce an implied no-strike clause despite the fact that the arbitrability of the dispute, and hence the legality of the strike over the dispute, presented a "substantial question of contractual interpretation." 414 U. S., at 384; see *id.*, at 380 n. 10. The strict reading that the Union would give the Norris-LaGuardia Act would not have permitted this result.[26]

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[26] The Court emphasizes the risk of conflicting determinations in this case, but ignores the risk of conflicting determinations in *Boys Markets* and *Gateway Coal*. In *Boys Markets*, the District Court was required to determine the arbitrability of the dispute and the legality of the strike, clear or not, and in *Gateway Coal*, the District Court need only have found that the arbitrability of the dispute and the legality of the strike were "a substantial question of contractual interpretation," and hence not clear at all. The likelihood of an injunction against a lawful strike was vastly larger under the standard of *Gateway Coal* than under a standard requiring the District Court to find a clear violation of the no-strike clause.

The Court obscures the latter point by misreading *Gateway Coal* to hold that an injunction was properly issued because the dispute in that case was arbitrable. *Ante*, at 408–409, n. 10. But *Gateway Coal* expressly held that the question whether the union properly invoked a provision for work stoppages because of unsafe mine conditions was "a substantial question of contractual interpretation, and the collective-bargaining agreement explicitly commits to resolution by an impartial umpire all disagreements 'as to the meaning and application of the provisions of this agreement.'" 414 U. S., at 384 (footnote omitted). Consistently with this holding, the arbitrator remained free to decide that the underlying dispute was not arbitra-

These considerations, however, do not support the conclusion that a sympathy strike should be temporarily enjoined whenever a collective-bargaining agreement contains a no-strike clause and an arbitration clause. The accommodation between the Norris-LaGuardia Act and § 301 (a) of the Labor Management Relations Act allows the judge to apply "the usual processes of the law" but not to take the place of the arbitrator. Because of the risk that a federal judge, less expert in labor matters than an arbitrator, may misconstrue general contract language, I would agree that no injunction or temporary restraining order should issue without first giving the union an adequate opportunity to present evidence and argument, particularly upon the proper interpretation of the collective-bargaining agreement; the judge should not issue an injunction without convincing evidence that the strike is clearly within the no-strike clause.[27] Furthermore, to protect the efficacy of arbitration, any such injunction should require the parties to submit the issue immediately to the contractual grievance procedure, and if the union so requests, at the last stage and upon an expedited schedule that assures a decision by the arbitrator as soon as practicable. Such stringent conditions would insure that only strikes in violation of the agreement would be enjoined and that the union's access to the arbitration process would not be foreclosed by the combined effect of a temporary injunction and protracted grievance procedures. Finally, as in *Boys*

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ble and hence that the enjoined strike was not in violation of the agreement.

[27] Of course, it is possible that an arbitrator would disagree with the court even when the latter finds the strike to be clearly prohibited. But in that case, the arbitrator's determination would govern, provided it withstands the ordinary standard of review for arbitrators' awards. See *Steelworkers* v. *Enterprise Corp.*, 363 U. S., at 597–599.

*Markets*, the normal conditions of equitable relief would have to be met.[28]

Like the decision in *Boys Markets*, this opinion reflects, on the one hand, my confidence that experience during the decades since the Norris-LaGuardia Act was passed has dissipated any legitimate concern about the impartiality of federal judges in disputes between labor and management, and on the other, my continued recognition of the fact that judges have less familiarity and expertise than arbitrators and administrators who regularly work in this specialized area. The decision in *Boys Markets* requires an accommodation between the Norris-LaGuardia Act and the Labor Management Relations Act. I would hold only that the terms of that accommodation do not entirely deprive the federal courts of all power to grant any relief to an employer, threatened with irreparable injury from a sympathy strike clearly in violation of a collective-bargaining agreement, regardless of the equities of his claim for injunctive relief pending arbitration.

Since in my view the Court of Appeals erroneously held that the District Court had no jurisdiction to enjoin the Union's sympathy strike, I would reverse and remand for consideration of the question whether the employer is entitled to an injunction.

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[28] "'[T]he District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.'" 398 U. S., at 254, quoting *Sinclair*, 370 U. S., at 228 (BRENNAN, J., dissenting).

# UNITED STATES ET AL. *v.* JANIS

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–958. Argued December 8, 1975—Decided July 6, 1976

Based upon the affidavit of a police officer, a Los Angeles judge issued a search warrant, pursuant to which the police seized from respondent $4,940 in cash and certain wagering records. The officer advised the Internal Revenue Service (IRS) that respondent had been arrested for bookmaking activity. Using a calculation based upon the seized evidence, the IRS assessed respondent for wagering excise taxes and levied upon the $4,940 in partial satisfaction. In the subsequent state criminal proceeding against respondent the trial court found the police officer's affidavit defective, granted a motion to quash the warrant, and ordered the seized items returned to the respondent, except for the $4,940. Respondent filed a refund claim for the $4,940 and, later, this action. The Government answered and counterclaimed for the unpaid balance of the assessment. Respondent moved to suppress the evidence seized and all copies thereof, and to quash the assessment. The District Court, after a hearing, concluded that respondent was entitled to a refund, because the assessment "was based in substantial part, if not completely, on illegally procured evidence in violation of [respondent's] Fourth Amendment rights," and that under the circumstances respondent was not required to prove the extent of the claimed refund. The assessment was quashed and the counterclaim accordingly was dismissed. The Court of Appeals affirmed. *Held:* The judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign (here the Federal Government) of evidence illegally seized by a criminal law enforcement agent of another sovereign (here the state government), since the likelihood of deterring law enforcement conduct through such a rule is not sufficient to outweigh the societal costs imposed by the exclusion. Pp. 443–460.

(a) The prime, if not the sole, purpose of the exclusionary rule "is to deter future unlawful police conduct." Pp. 443–447.

(b) Whether the exclusionary rule is a deterrent has not yet been demonstrated. Assuming, however, that it is a deterrent,

then its use in situations where it is now applied must be deemed to suffice to accomplish its purpose, because the local law enforcement official is already "punished" by the exclusion of the evidence in both the state and the federal criminal trials. The additional marginal deterrence provided by its extension in cases like this one does not outweigh the societal costs of excluding concededly relevant evidence. Pp. 447–460.

Reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 460. STEWART, J., filed a dissenting opinion, *post*, p. 460. STEVENS, J., took no part in the consideration or decision of the case.

*Solicitor General Bork* argued the cause for petitioners. With him on the brief were *Assistant Attorney General Crampton, Stuart A. Smith, Robert E. Lindsay,* and *Carleton D. Powell.*

*Herbert D. Sturman* argued the cause for respondent. With him on the brief was *Richard G. Sherman.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents an issue of the appropriateness of an extension of the judicially created exclusionary rule: Is evidence seized by a state criminal law enforcement officer in good faith, but nonetheless unconstitutionally, inadmissible in a civil proceeding by or against the United States?

I

In November 1968 the Los Angeles police obtained a warrant directing a search for bookmaking paraphernalia at two specified apartment locations in the city and, as well, on the respective persons of Morris Aaron Levine and respondent Max Janis. The warrant was issued by

a judge of the Municipal Court of the Los Angeles Judicial District. It was based upon the affidavit of Officer Leonard Weissman.[1] After the search, made pursuant

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[1] Officer Weissman's affidavit, App. 69–74, stated: He and Sergeant Briggs of the Los Angeles Police Department each had received information from an informant concerning respondent Janis and Levine and concerning telephone numbers the two men used for bookmaking. Police investigation disclosed that Janis had two telephones with unpublished numbers, including the number given by Weissman's informant, and that there was a third published number at the same address in the name of Nancy L. Janis. The unpublished numbers given by Weissman's informant as being used by Levine were found to be maintained by Levine at a different address, and that address was the one given by Briggs' informant as being Levine's base of operations. Both informants stated that Levine and Janis were working in concert. Each officer regarded his informant as reliable; the informant had given information in the past that led to arrests for bookmaking and, in the case of Briggs' informant, to convictions as well. Preliminary hearings and trials were pending for persons arrested with the aid of Weissman's informant. Each officer and his informant believed that it was necessary for the informant's safety, and his future usefulness to law enforcement officers, that his identity be kept secret.

Weissman further stated:

"From the nature and context of the information supplied by the informant to this affiant, and from the nature and context of the information which was supplied to Sgt. Briggs, as told to this affiant, it is believed that the informants . . . at all times mentioned in this affidavit, unless otherwise specified, were speaking with personal knowledge." *Id.*, at 73.

The affidavit, taken in its entirety, bears some similarity to the affidavit the Court later considered in *Spinelli* v. *United States*, 393 U. S. 410, 420–422 (1969). *Spinelli* was a 5–3 decision handed down two months *after* the Los Angeles warrant in the present case had been issued. MR. JUSTICE WHITE joined the opinion in *Spinelli*, *id.*, at 423–429, but, in doing so, referred, *id.*, at 427, to the "tension between *Draper* [v. *United States*, 358 U. S. 307 (1959)]," on the one hand, and *Nathanson* v. *United States*, 290 U. S. 41 (1933), and *Aguilar* v. *Texas*, 378 U. S. 108 (1964), on the other, and, "[p]ending full-scale reconsideration" of *Draper* "or of the

to the warrant, both the respondent and Levine were arrested and the police seized from respondent property consisting of $4,940 in cash and certain wagering records.[2]

Soon thereafter, Officer Weissman telephoned an agent of the United States Internal Revenue Service and informed the agent that Janis had been arrested for bookmaking activity.[3] With the assistance of Weissman, who was familiar with bookmakers' codes, the revenue agent analyzed the wagering records that had been seized and determined from them the gross volume of respondent's gambling activity for the five days immediately preceding the seizure. Weissman informed the agent that he had conducted a surveillance of respondent's activities that indicated that respondent had been engaged in book-

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*Nathanson-Aguilar* cases," joined "the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court." 393 U. S., at 429.

[2] The Internal Revenue Service's Certificate of Assessments and Payments, App. 81, shows a credit of $5,097, the amount actually seized by the police and subjected to the Service's subsequent levy. The Government acknowledges, however, that $157 of this amount was money belonging to Levine. It was applied upon the joint assessment made against both Janis and Levine. Levine has not sought a refund of the $157. Brief for United States 5 n. 1. The present case, therefore, concerns only the $4,940 taken from respondent Janis.

[3] Officer Weissman testified that there was no departmental policy to call the Internal Revenue Service in a situation of this kind. He did it "as a matter of police procedure." He would not do it, he said, on what he "would consider a small-size book, but I considered this one a major-size book. So, I, therefore, did it." App. 42. He further stated that some of his fellow officers had acted similarly, but that he did not think "that they all have done it." *Ibid.* The District Court did not rest its conclusion on any federal involvement in, or encouragement of, the search. We therefore must assume, for purposes of this opinion, that there was no federal involvement. See n. 31, *infra*.

making during the 77-day period from September 14 through November 30, 1968, the day of the arrest.

Respondent had not filed any federal wagering tax return pertaining to bookmaking activities for that 77-day period. Based exclusively upon its examination of the evidence so obtained by the Los Angeles police, the Internal Revenue Service made an assessment jointly against respondent and Levine for wagering taxes, under § 4401 of the Internal Revenue Code of 1954, 26 U. S. C. § 4401, in the amount of $89,026.09, plus interest. The amount of the assessment was computed by first determining respondent's average daily gross proceeds for the five-day period covered by the seized material and analyzed by the agent, and then multiplying the resulting figure by 77, the period of the police surveillance of respondent's activities.[4] The assessment having been made, the Internal Revenue Service exercised its statutory authority, under 26 U. S. C. § 6331, to levy upon the $4,940 in cash in partial satisfaction of the assessment against respondent.

Charges were filed in due course against respondent and Levine in Los Angeles Municipal Court for violation of the local gambling laws. They moved to quash the search warrant. A suppression hearing was held by the same judge who had issued the warrant. The defendants pressed upon the court the case of *Spinelli* v. *United States*, 393 U. S. 410 (1969), which had been decided just three weeks earlier and *after* the search warrant had been issued. They urged that the Weissman affidavit did not set forth, in sufficient detail, the underlying circumstances to enable the issuing magistrate to determine in-

[4] The wagering excise tax at the time was 10% of the amount of the wagers. § 4401 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 4401 (a). The rate was reduced to 2%, effective December 1, 1974, by Pub. L. 93–499, § 3 (a), 88 Stat. 1550.

dependently the reliability of the information supplied by the informants. The judge granted the motion to quash the warrant. He then ordered that all items seized pursuant to it be returned except the cash that had been levied upon by the Internal Revenue Service. App. 78–80.

In June 1969 respondent filed a claim for refund of the $4,940. The claim was not honored, and 18 months later, in December 1970, respondent filed suit for that amount in the United States District Court for the Central District of California. The Government answered and counterclaimed for the substantial unpaid balance of the assessment.[5] In pretrial proceedings, it was agreed that the "sole basis of the computation of the civil tax assessment . . . was . . . the items obtained pursuant to the search warrant . . . and the information furnished to [the revenue agent] by Officer Weissman with respect to the duration of [respondent's] alleged wagering activities."[6] *Id.*, at 18. Respondent then moved to suppress the evidence seized, and all copies thereof in the possession of the Service, and to quash the assessment. *Id.*, at 23–24.

At the outset of the hearing on the motion, the District Court observed that it was "reluctantly holding that

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[5] The Government advises us that, in order to avoid multiple litigation, its policy is to counterclaim in a refund suit, just as it did here, where there is an outstanding unpaid assessment and the refund suit and the counterclaim involve the same facts. Brief for United States 17 n. 4.

[6] The Certificate of Assessments and Payments was stipulated "to be admissible without objection." App. 20. The Government did not seek to introduce the wagering records obtained by the Los Angeles police.

The Government has not asserted that, absent the seized materials, it would have had grounds for an assessment against respondent and Levine.

the affidavit supporting the search warrant is insufficient under the *Spinelli* and *Aguilar* [v. *Texas*, 378 U. S. 108 (1964)] doctrines." *Id.*, at 47. It then concluded that "[a]ll of the evidence utilized as the basis" of the assessment "was obtained directly or indirectly as a result of the search pursuant to the defective search warrant," and that, consequently, the assessment "was based in substantial part, if not completely, on illegally procured evidence . . . in violation of [respondent's] Fourth Amendment rights to be free from unreasonable searches and seizures." 73–1 USTC ¶ 16,083, p. 81,392 (1973). The court concluded that Janis was entitled to a refund of the $4,940, together with interest thereon, "for the reason that substantially all, if not all, of the evidence utilized by the defendants herein in making their assessment . . . was illegally obtained, and, as such, the assessment was invalid." *Ibid.* Further, where, as here, "illegally obtained evidence constitutes the basis of a federal tax assessment," the respondent was "not required to prove the extent of the refund to which he claims he is entitled." *Id.*, at 81,393. Instead, it was sufficient if he prove "that substantially all, if not all, of the evidence upon which the assessment was based was the result of illegally obtained evidence." Accordingly, the court ordered that the civil tax assessment made by the Internal Revenue Service "against all the property and assets of . . . Janis be quashed," and entered judgment for the respondent. *Ibid.* The Government's counterclaim was dismissed with prejudice. The United States Court of Appeals for the Ninth Circuit, by unpublished memorandum without opinion, affirmed on the basis of the District Court's findings of fact and conclusions of law. Pet. for Cert. 12A.

Because of the obvious importance of the question, we granted certiorari. 421 U. S. 1010 (1975).

## II

Some initial observations about the procedural posture of the case in the District Court are indicated. If there is to be no limit to the burden of proof the respondent, as "taxpayer," must carry, then, even though he were to obtain a favorable decision on the inadmissibility-of-evidence issue, the respondent on this record could not possibly defeat the Government's counterclaim. The Government notes, properly we think, that the litigation is composed of two separate elements: the refund suit instituted by the respondent, and the collection suit instituted by the United States through its counterclaim. In a refund suit the taxpayer bears the burden of proving the amount he is entitled to recover. *Lewis* v. *Reynolds,* 284 U. S. 281 (1932). It is not enough for him to demonstrate that the assessment of the tax for which refund is sought was erroneous in some respects.

This Court has not spoken with respect to the burden of proof in a tax collection suit. The Government argues here that the presumption of correctness that attaches to the assessment in a refund suit must also apply in a civil collection suit instituted by the United States under the authority granted by §§ 7401 and 7403 of the Code, 26 U. S. C. §§ 7401 and 7403. Thus, it is said, the defendant in a collection suit has the same burden of proving that he paid the correct amount of his tax liability.

The policy behind the presumption of correctness and the burden of proof, see *Bull* v. *United States,* 295 U. S. 247, 259–260 (1935), would appear to be applicable in each situation. It accords, furthermore, with the burden-of-proof rule which prevails in the usual preassessment proceeding in the United States Tax Court. *Lucas* v. *Structural Steel Co.,* 281 U. S. 264, 271 (1930); *Welch* v. *Helvering,* 290 U. S. 111, 115 (1933); Rule 142 (a)

of the Rules of Practice and Procedure of the United States Tax Court (1973). In any event, for purposes of this case, we assume that this is so and that the burden of proof may be said technically to rest with respondent Janis.

Respondent, however, submitted no evidence tending either to demonstrate that the assessment was incorrect or to show the correct amount of wagering tax liability, if any, on his part. In the usual situation one might well argue, as the Government does, that the District Court then could not properly grant judgment for the respondent on either aspect of the suit. But the present case may well not be the usual situation. What we have is a "naked" assessment without *any* foundation whatsoever if what was seized by the Los Angeles police cannot be used in the formulation of the assessment.[7] The determination of tax due then may be one "without rational foundation and excessive," and not properly subject to the usual rule with respect to the burden of proof in tax cases. *Helvering* v. *Taylor*, 293 U. S. 507, 514–515 (1935).[8] See 9 J. Mertens, Law of Federal Income Taxation § 50.65 (1971).

There appears, indeed, to be some debate among the

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[7] The situation may be described as having some resemblance to that for which the Court has developed an exception to the Anti-Injunction Act, § 7421 (a) of the Code, 26 U. S. C. § 7421 (a). See *Enochs* v. *Williams Packing Co.*, 370 U. S. 1 (1962); *Bob Jones University* v. *Simon*, 416 U. S. 725 (1974); *Commissioner* v. *"Americans United" Inc.*, 416 U. S. 752 (1974); *Laing* v. *United States*, 423 U. S. 161 (1976); *Commissioner* v. *Shapiro*, 424 U. S. 614 (1976).

[8] *Taylor*, although decided more than 40 years ago, has never been cited by this Court on the burden-of-proof issue. The Courts of Appeals, the Court of Claims, the Tax Court, and the Federal District Courts, however, frequently have referred to that aspect of the case.

Federal Courts of Appeals, in different factual contexts, as to the effect upon the burden of proof in a tax case when there is positive evidence that an assessment is incorrect. Some courts indicate that the burden of showing the amount of the deficiency then shifts to the Commissioner.[9] Others hold that the burden of showing the correct amount of the tax remains with the taxpayer.[10] However that may be, the debate does not extend to the situation where the assessment is shown to be naked and without *any* foundation. The courts then appear to apply the rule of the *Taylor* case. See *United States* v. *Rexach*, 482 F. 2d 10, 16–17, n. 3 (CA1), cert. denied, 414 U. S. 1039 (1973); *Pizzarello* v. *United States*, 408 F. 2d 579 (CA2), cert. denied, 396 U. S. 986 (1969); *Suarez* v. *Commisioner*, 58 T. C. 792, 814–815 (1972). But cf. *Compton* v. *United States*, 334 F. 2d 212, 216 (CA4 1964).

Certainly, proof that an assessment is utterly without foundation is proof that it is arbitrary and erroneous. For purposes of this case, we need not go so far as to accept the Government's argument that the exclusion of the evidence in issue here is insufficient to require judgment for the respondent or even to shift the burden to the Government. We are willing to assume that if the District Court was correct in ruling that the evidence seized by the Los Angeles police may not be used in formulating the assessment (on which both the levy and the counterclaim were based), then the District Court was also correct in granting judgment for Janis in both

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[9] *E. g.*, *Foster* v. *Commissioner*, 391 F. 2d 727, 735 (CA4 1968); *Herbert* v. *Commissioner*, 377 F. 2d 65, 69 (CA9 1967). See *Bar L Ranch, Inc.* v. *Phinney*, 426 F. 2d 995, 999 (CA5 1970).

[10] *E. g.*, *United States* v. *Rexach*, 482 F. 2d 10, 15–17 (CA1), cert. denied, 414 U. S. 1039 (1973); *Psaty* v. *United States*, 442 F. 2d 1154, 1158–1161 (CA3 1971); *Ehlers* v. *Vinal*, 382 F. 2d 58, 65–66 (CA8 1967). See *Bar L Ranch, Inc.* v. *Phinney*, 426 F. 2d, at 998.

aspects of the present suit. This assumption takes us, then, to the primary issue.[11]

## III

This Court early pronounced a rule that the Fifth Amendment's command that no person "shall be compelled in any criminal case to be a witness against himself" renders evidence falling within the Amendment's prohibition inadmissible. *Boyd* v. *United States,* 116 U. S. 616 (1886). It was not until 1914, however, that the Court held that the Fourth Amendment alone may be the basis for excluding from a federal criminal trial evidence seized by a federal officer in violation solely of that Amendment. *Weeks* v. *United States,* 232 U. S. 383. This comparatively late judicial creation of a Fourth Amendment exclusionary rule is not particularly surprising. In contrast to the Fifth Amendment's direct command against the admission of compelled testimony, the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation.[12] In

[11] Although the present case presents only the issue whether such evidence may be used in the formulation of the assessment, there appears to be no difference between that question and the issue whether the evidence is to be excluded in the refund or collection suit itself. We perceive no principled distinction to be made between the use of the evidence as the basis of an assessment and its use in the case in chief.

[12] "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter* v. *Walker,* 381 U. S. 618, 637 (1965). "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U. S. 206, 217 (1960). See *United States* v. *Calandra,* 414 U. S. 338, 347–348 (1974); *Mapp* v. *Ohio,* 367 U. S. 643, 656 (1961); *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 413 (1966); *Terry* v. *Ohio,* 392 U. S. 1, 29 (1968).

*Weeks* it was held, however, that the Fourth Amendment did not apply to state officers, and, therefore, that material seized unconstitutionally by a state officer could be admitted in a federal criminal proceeding. This was the "silver platter" doctrine.[13]

In *Wolf* v. *Colorado*, 338 U. S. 25 (1949), the Court determined that the Due Process Clause of the Fourteenth Amendment reflected the Fourth Amendment to the extent of providing those protections against intrusions that are " 'implicit in the concept of ordered liberty.' " *Id.*, at 27. Nonetheless, the Court, in not applying the *Weeks* doctrine in a state trial to the product of a state search, held:

> "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." 338 U. S., at 31.

Not long thereafter, the Court ruled that means used by a State to procure evidence could be sufficiently offensive to the concept of ordered liberty as to make admission of the evidence so procured a violation of the Due Process Clause, *Rochin* v. *California*, 342 U. S. 165 (1952), but that such a violation would exist only in the most extreme case, *Irvine* v. *California*, 347 U. S. 128 (1954).

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[13] In *Elkins* v. *United States*, 364 U. S., at 207 n. 1, the Court noted that the appellation stems from Mr. Justice Frankfurter's plurality opinion in *Lustig* v. *United States*, 338 U. S. 74 (1949):

"The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." *Id.*, at 78–79.

Thus, as matters then stood, the Fourth Amendment was applicable to the States, but a State could allow an official to engage in a violation thereof with no judicial sanction except in the most extreme case. In addition, federal authorities, if they happened upon a State so inclined, could profit from the State's action by receiving on a silver platter evidence unconstitutionally obtained. The federal authorities, profiting thereby, had no judicially created reason to discourage unconstitutional searches by a State, and the States, having no judicially mandated controls, were free to engage in such searches.[14]

*Elkins* v. *United States,* 364 U. S. 206, was decided in 1960. Invoking its "supervisory power over the administration of criminal justice in the federal courts," *id.,* at 216, the Court held that

> "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial." *Id.,* at 223.

The rule thus announced apparently served two purposes. First, it assured that a State, which could admit the evidence in its own proceedings if it so chose,

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[14] The absence of this Court's imposition of controls did not mean, of course, that the States were running unchecked in their pursuit of evidence. Not only were there tort remedies and internal disciplinary sanctions available, but, as the Court noted in *Elkins:*

"Not more than half the states continue totally to adhere to the rule that evidence is freely admissible no matter how it was obtained. Most of the others have adopted the exclusionary rule in its entirety; the rest have adopted it in part." 364 U. S., at 219 (footnote omitted).

See also *id.,* at 224–225 (Appendix to opinion).

nevertheless would suffer some deterrence in that its federal counterparts would be unable to use the evidence in federal criminal proceedings. Second, the rule discouraged federal authorities from using a state official to circumvent the restrictions of *Weeks*.

Only one year later, however, the exclusionary rule was made applicable to state criminal trials. *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The Court ruled:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Id.*, at 655.

The debate within the Court on the exclusionary rule has always been a warm one.[15] It has been unaided, unhappily, by any convincing empirical evidence on the effects of the rule. The Court, however, has established that the "prime purpose" of the rule, if not the sole one, "is to deter future unlawful police conduct." *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). See *United States* v. *Peltier*, 422 U. S. 531, 536–539 (1975). Thus,

> "[i]n sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U. S., at 348.

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[15] Except for the unanimous decision written by Mr. Justice Day in *Weeks* v. *United States*, 232 U. S. 383 (1914), the evolution of the exclusionary rule has been marked by sharp divisions in the Court. Indeed, *Wolf*, *Lustig*, *Rochin*, *Irvine*, *Elkins*, *Mapp*, and *Calandra* produced a combined total of 27 separate signed opinions or statements.

And

> "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Ibid.*[16]

In the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state.[17]

## IV

In the present case we are asked to create judicially a deterrent sanction by holding that evidence obtained by a state criminal law enforcement officer in good-faith reliance on a warrant that later proved to be defective shall be inadmissible in a federal civil tax proceeding. Clearly, the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule, and, as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable.[18]

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[16] Thus, the Court has held that the exclusionary rule may be invoked only by those whose rights are infringed by the search itself, and not by those who are merely aggrieved by the introduction of evidence so obtained. *Alderman* v. *United States,* 394 U. S. 165, 174–175 (1969).

[17] The Court has applied the exclusionary rule in a proceeding for forfeiture of an article used in violation of the criminal law. *Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 (1965). There it expressly relied on the fact that "forfeiture is clearly a penalty for the criminal offense" and "[i]t would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." *Id.,* at 701. See also *Boyd* v. *United States,* 116 U. S. 616, 634 (1886), where a forfeiture proceeding was characterized as "quasi-criminal."

[18] There are studies and commentary to the effect that the exclu-

In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred. In this case it is the state officer who is the primary object of the sanction. It is his conduct that is to be controlled. Two factors suggest that a sanction in addition to those that presently exist is unnecessary. First, the local law enforcement official is already "punished" by the exclusion of the evidence in the state criminal trial.[19] That, necessarily, is of substantial concern to him. Second, the evidence is also excludable in the federal criminal trial, *Elkins* v. *United States, supra,* so that the entire criminal enforcement process, which is the concern and duty of these officers, is frustrated.[20]

Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription

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sionary rule tends to lessen the accuracy of the evidence presented in court because it encourages the police to lie in order to avoid suppression of evidence. See, *e. g.*, Garbus, Police Perjury: An Interview, 8 Crim. L. Bull. 363 (1972); Kuh, The Mapp Case One Year After; An Appraisal of Its Impact in New York, 148 N. Y. L. J. Nos. 55 and 56 (1962); Comment, Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap, 60 Geo. L. J. 507 (1971); Effect of *Mapp* v. *Ohio* on Police Search-and-Seizure Practices in Narcotics Cases, 4 Colum. J. L. & Soc. Probs. 87 (1968). See also *People* v. *McMurty,* 64 Misc. 2d 63, 314 N. Y. S. 2d 194 (N. Y. C. Crim. Ct. 1970).

[19] It is of interest to note that the exclusion of this evidence from the California state trial was required by a decision of the State's Supreme Court issued some years prior to *Mapp.* See *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 (1955).

[20] We are aware of the suggestion, made by some commentators and incorporated in some studies, that police often view trial and conviction as a lesser aspect of law enforcement. See, *e. g.*, J. Skolnick, Justice Without Trial 219–235 (2d ed., 1975); Milner, Supreme Court Effectiveness and the Police Organization, 36 Law & Contemp. Probs. 467, 475, 479 (1971); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 720–736 (1970).

of what concededly is relevant evidence. See, *e. g., Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 411 (1971) (BURGER, C. J., dissenting); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 429 (1974). And alternatives that would be less costly to societal interests have been the subject of extensive discussion and exploration.[21]

Equally important, although scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the

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[21] See, *e. g., Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 411 (1971) (BURGER, C. J., dissenting); ALI Model Code of Pre-Arraignment Procedure § SS 290.2 (Proposed Official Draft 1975); Davidow, Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal, 4 Tex. Tech. L. Rev. 317 (1973); Davis, An Approach to Legal Control of the Police, 52 Texas L. Rev. 703 (1974); Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955); Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, 1975 Wash. U. L. Q. 621; Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027 (1974); LaFave, Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police, 30 Mo. L. Rev. 566 (1965); McGowan, Rule-Making and the Police, 70 Mich. L. Rev. 659 (1972); Quinn, The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights, 52 J. Urb. L. 25 (1974); Roche, A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board, 30 Wash. & Lee L. Rev. 223 (1973); Spiotto, The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U. S. Exclusionary Rule, 1 J. Police Sci. & Ad. 36 (1973); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Leg. Stud. 243 (1973); Comment, Federal Injunctive Relief from Illegal Search, 1967 Wash. U. L. Q. 104; Comment, The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L. J. 143 (1968); Comment, Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 104 (1970).

subject, in its own way, appears to be flawed.[22] It would not be appropriate to fault those who have attempted empirical studies for their lack of convincing data. The

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[22] The salient and most comprehensive study is that of Oaks, cited above in n. 20. Professor (now President) Oaks reviews at length the data in previous studies and the problems involved in drawing conclusions from those data. The previous studies include, *inter alia*, D. Oaks & W. Lehman, A Criminal Justice System and the Indigent: A Study of Chicago and Cook County (1968); J. Skolnick, Justice Without Trial (1st ed. 1966); Goldstein, Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L. J. 543 (1960); Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 Cornell L. Q. 436 (1964); Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim. L. C. & P. S. 171 (1962); Kamisar, *Wolf* and *Lustig* Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083 (1959); Katz, The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications, 45 N. C. L. Rev. 119 (1966); Kuh, *supra*, n. 18; Nagel, Testing the Effects of Excluding Illegally Seized Evidence, 1965 Wis. L. Rev. 283; Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. C. & P. S. 255 (1961); Comment, Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy, 47 Nw. U. L. Rev. 493 (1952); Weinstein, Local Responsibility for Improvement of Search and Seizure Practices, 34 Rocky Mt. L. Rev. 150 (1962); Younger, Constitutional Protection on Search and Seizure Dead?, 3 Trial 41 (Aug.-Sept. 1967); Comment, Effect of *Mapp* v. *Ohio* on Police Search-and-Seizure Practices in Narcotics Cases, 4 Colum. J. L. & Soc. Probs. 87 (1968).

Oaks discusses the types of research that may be possible, and the difficulties inherent in each. His final conclusion is straightforward:

"Writing just after the decision in *Mapp* v. *Ohio*, Francis A. Allen declared that up to that time, 'no effective quantitative measure of the rule's deterrent efficacy has been devised or applied.' [Allen, Federalism and the Fourth Amendment: A Requiem for *Wolf*, 1961 Sup. Ct. Rev. 1, 34.] That conclusion is not yet outdated. The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously

number of variables is substantial,[23] and many cannot be measured or subjected to effective controls. Record-keeping before *Mapp* was spotty at best, a fact which

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fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." Oaks, *supra*, n. 20, at 709.

More recently, Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion, 62 Ky. L. J. 681 (1974), discusses the data collected and reviewed by Oaks, and explores the difficulties in drawing conclusions from those data. The paper also reviews studies that appeared subsequent to the Oaks article: Spiotto, *supra*, n. 21, at 243; and two papers by Michael Ban, The Impact of *Mapp* v. *Ohio* on Police Behavior (delivered at the annual meeting of the Midwest Political Science Assn., Chicago, May 1973) and Local Courts v. The Supreme Court: The Impact of *Mapp* v. *Ohio* (delivered at the annual meeting of the American Political Science Assn., New Orleans, Sept. 1973). Canon describes his own research, but his data and conclusions appear to suffer from many of the same difficulties and faults present in the prior studies, many of which are explicitly recognized. Consequently, although Canon argues in favor of retaining the exclusionary rule while Oaks argues against it, Canon's conclusions are no firmer than are Oaks': "Consequently, our argument is negative rather than positive; we are maintaining that the evidence from the 14 cities certainly does not support a conclusion that the exclusionary rule had no impact upon arrests in search-and-seizure type crimes in the years following its imposition." Canon, *supra*, at 707. "Consequently, we cannot confidently attribute the increased use of search warrants entirely or even primarily to police reaction to the exclusionary rule." *Id.*, at 713. See also *id.*, at 724–725 and at 725–726. Canon concedes that "the inconclusiveness of our findings is real enough," *id.*, at 726, but argues that the exclusionary rule should be given time to take effect. "Only after a substantial amount of time has passed do trends of changing behavior (if any) become apparent." *Id.*, at 727. One might wonder why, if the substantial amount of time necessary for the rule to take effect is extremely relevant, the study fails to take into account the fact that over half the States have had an exclusionary rule for a significantly greater length of time than *Mapp* has been on the books.

Most recently, Critique, On the Limitations of Empirical Evalu-

[*Footnote 23 is on p. 452*]

thus severely hampers before-and-after studies. Since *Mapp*, of course, all possibility of broad-scale controlled or even semi-controlled comparison studies has been eliminated.[24] "Response" studies are hampered by the

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ations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 Nw. U. L. Rev. 740 (1974), reviews the Oaks, Canon, and Spiotto papers and the studies mentioned therein. The comment discusses the design difficulties present and involved in studying the deterrent effect of the exclusionary rule in general. Although a proponent of the rule, the author concludes:

"A review of Spiotto's research and that conducted by others does not demonstrate the ineffectiveness of the exclusionary rule. Rather, it tends to illustrate the obstacles that stand in the way of any sound, empirical evaluation of the rule. When all factors are considered, there is virtually no likelihood that the Court is going to receive any 'relevant statistics' which objectively measure the 'practical efficacy' of the exclusionary rule." *Id.*, at 763–764.

The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied. It is, of course, virtually impossible to study the marginal deterrence added to *Mapp* by the *Elkins* silver platter rule because of the difficulty of controlling the effect of intersovereign exclusion.

We are aware of no study on the possible deterrent effect of excluding evidence in a civil proceeding.

[23] For discussion of the variables involved, see Canon, *supra*, n. 22; Geller, *supra*, n. 21; Kaplan, *supra*, n. 21; Milner, *supra*, n. 20; Oaks, *supra*, n. 20; Wright, Must the Criminal Go Free if the Constable Blunders?, 50 Texas L. Rev. 736 (1972); Critique, *supra*.

[24] Studies have attempted to compare the experience in countries without the exclusionary rule with the experience in this country. See, *e. g.*, Oaks, *supra*, n. 20, at 701–706; Spiotto, The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U. S. Exclusionary Rule, 1 J. Police Sci. & Ad. 36 (1973). See generally The Exclusionary Rule Regarding Illegally Seized Evidence: An International Symposium, 52 J. Crim. L. C. & P. S. 245 (1961). The difficulties in drawing conclusions from cross-cultural comparisons are self-evident. See also Canon, *supra*, n. 22, at 692 n. 53.

presence of the respondents' interests.[25] And extrapolation studies are rendered highly inconclusive by the changes in legal doctrines and police-citizen relationships that have taken place in the 15 years since *Mapp* was decided.[26]

We find ourselves, therefore, in no better position than the Court was in 1960 when it said:

> "Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule." *Elkins* v. *United States,* 364 U. S., at 218.

If the exclusionary rule is the "strong medicine" that its proponents claim it to be, then its use in the situations in which it is now applied (resulting, for example, in this case in frustration of the Los Angeles police officers' good-faith duties as enforcers of the criminal laws) must be assumed to be a substantial and efficient deterrent. Assuming this efficacy, the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not out-

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[25] See generally *id.*, at 713–717, 723–725; Katz, *supra,* n. 22; Murphy, Judicial Review of Police Methods in Law Enforcement, 44 Texas L. Rev. 939, 941–943 (1966).

[26] We do not mean to imply that more accurate studies could never be developed, or that what statisticians refer to as "triangulation" might not eventually provide us with firmer conclusions. We just do not find that the studies now available provide us with reliable conclusions.

weigh the cost to society of extending the rule to that situation.[27] If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted. Under either assumption, therefore, the extension of the rule is unjustified.[28]

In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule.[29]

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[27] If the exclusionary rule is not "strong medicine," but does provide some marginal deterrence in the criminal situations in which it is now applied, that marginal deterrence is diluted by the attenuation existing when a different sovereign uses the material in a civil proceeding, and we must again find that the marginal utility of the creation of such a rule is outweighed by the costs it imposes on society.

[28] "[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." *Desist* v. *United States*, 394 U. S. 244, 254 n. 24 (1969).

"As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U. S., at 348.

"Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U. S. 433, 447 (1974). See *United States* v. *Peltier*, 422 U. S., at 537–538.

[29] "[I]t will not do to forget that the *Weeks* rule is a rule arrived at only on the nicest balance of competing considerations and in view of the necessity of finding some effective judicial sanction to preserve the Constitution's search and seizure guarantees. The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing

Respondent argues, however, that the application of the exclusionary rule to civil proceedings long has been recognized in the federal courts. He cites a number of cases.[30] But respondent does not critically distinguish between those cases in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence, on the one hand, and those cases, such as the present one, on the other hand, where the officer has no responsibility or duty to, or agreement with, the sovereign seeking to use the evidence.[31]

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officers.' As it serves this function, the rule is a needed, but grud[g]ingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest as declared by Congress." Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 388–389 (1964) (footnotes omitted).

[30] *Suarez* v. *Commissioner,* 58 T. C. 792 (1972); *Pizzarello* v. *United States,* 408 F. 2d 579 (CA2), cert. denied, 396 U. S. 986 (1969); *Knoll Associates, Inc.* v. *FTC,* 397 F. 2d 530 (CA7 1968); *Powell* v. *Zuckert,* 125 U. S. App. D. C. 55, 366 F. 2d 634 (1966); *Rogers* v. *United States,* 97 F. 2d 691 (CA1 1938); *Anderson* v. *Richardson,* 354 F. Supp. 363 (SD Fla. 1973); *Iowa* v. *Union Asphalt & Roadoils, Inc.,* 281 F. Supp. 391 (SD Iowa 1968), aff'd *sub nom. Standard Oil Co.* v. *Iowa,* 408 F. 2d 1171 (CA8 1969); *United States* v. *Stonehill,* 274 F. Supp. 420 (SD Cal. 1967), aff'd, 405 F. 2d 738 (CA9 1968), cert. denied, 395 U. S. 960 (1969); *United States* v. *Blank,* 261 F. Supp. 180 (ND Ohio 1966); *Lassoff* v. *Gray,* 207 F. Supp. 843 (WD Ky. 1962).

[31] The decision by the District Court to suppress the evidence did not rest upon any finding of such an agreement or participation, and from the record it does not appear that any "federal participation" existed. See *Lustig* v. *United States,* 338 U. S. 74 (1949); *Byars* v. *United States,* 273 U. S. 28 (1927). As stated above in n. 3, we decide the present case on the assumption that no such agreement or arrangement existed. Respondent remains free on remand to attempt to prove that there was federal participation in

The seminal cases that apply the exclusionary rule to a civil proceeding involve "intrasovereign" violations,[32] a situation we need not consider here. In some cases the courts have refused to create an exclusionary rule for either intersovereign or intrasovereign violations in proceedings other than strictly criminal prosecutions. See *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F. 2d 1161 (CA2 1970) (intrasovereign/parole revocation); *United States* v. *Schipani*, 435 F. 2d 26 (CA2 1970), cert. denied, 401 U. S. 983 (1971) (intersovereign/sentencing).[33] And in *Compton* v. *United States*, 334 F. 2d 212, 215–216 (1964), a case remarkably like this one, the Fourth Circuit held that the presumption of correctness given a tax assessment was not affected by the fact that the assessment was based upon evidence unconstitutionally seized by state criminal law enforcement officers. Only one case cited by the respondent squarely holds that there must be an exclusionary rule barring use in a civil proceeding by one sovereign of material seized in violation of the Fourth Amendment by an officer of another sovereign.[34] In *Suarez* v. *Commissioner*, 58 T. C. 792

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fact. If he succeeds in that proof, he raises the question, not presented by this case, whether the exclusionary rule is to be applied in a civil proceeding involving an intrasovereign violation.

It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act. See *Burdeau* v. *McDowell*, 256 U. S. 465 (1921); *United States* v. *Stonehill*, *supra*.

[32] See *Pizzarello* v. *United States*, *supra*; *Knoll Associates, Inc.* v. *FTC*, *supra*; *Powell* v. *Zuckert*, *supra*; *Iowa* v. *Union Asphalt & Roadoils, Inc.*, *supra*; *United States* v. *Blank*, *supra*. See also *Hand* v. *United States*, 441 F. 2d 529 (CA5 1971).

[33] We express no view on the issue whether sentencing and parole revocation proceedings constitute "civil proceedings" for the purposes of the principles announced in this opinion.

[34] In *Anderson* v. *Richardson*, 354 F. Supp. 363 (SD Fla. 1973), which otherwise might be in this category, the trial court relied on

(1972) (reviewed by the court, with two judges dissenting), the Tax Court determined that the exclusionary rule should be applied in a situation similar to the one that confronts us here. The court concluded that

> "any competing consideration based upon the need for effective enforcement of civil tax liabilities (compare *Elkins* v. *United States* . . .) must give way to the higher goal of protection of the individual and the necessity for preserving confidence in, rather than encouraging contempt for, the processes of Government." *Id.*, at 805.

No appeal was taken.

We disagree with the broad implications of this statement of the Tax Court for two reasons. To the extent that the court did not focus on the deterrent purpose of the exclusionary rule, the law has since been clarified. See *United States* v. *Calandra*, 414 U. S. 338 (1974); *United States* v. *Peltier*, 422 U. S. 531 (1975). Moreover, the court did not distinguish between intersovereign and intrasovereign uses of unconstitutionally seized material. Working, as we must, with the absence of convincing empirical data, common sense dictates that

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*Pizzarello, supra*, in enjoining a tax assessment based upon illegally seized evidence. The Government had conceded, however, that the jeopardy assessment upon which it relied could not ultimately succeed. 354 F. Supp., at 366. To the extent that dicta in that case might be relevant, the court failed to note that *Pizzarello* concerned an intrasovereign situation.

In *United States* v. *Chase*, 67-1 USTC ¶ 15733 (DC 1966), the District Court relied entirely upon principles of judicial integrity in excluding from a tax proceeding evidence unconstitutionally seized by state agents. *Id.*, at 84,477. As noted previously, the Court has since clarified the fact that the primary, if not the sole, function of the exclusionary rule is deterrence. See *United States* v. *Calandra*, *supra*; *United States* v. *Peltier*, *supra*. See also n. 35, *infra*.

the deterrent effect of the exclusion of relevant evidence is highly attenuated when the "punishment" imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign. In *Elkins* the Court indicated that the assumed interest of criminal law enforcement officers in the criminal proceedings of another sovereign counterbalanced this attenuation sufficiently to justify an exclusionary rule. Here, however, the attenuation is further augmented by the fact that the proceeding is one to enforce only the civil law of the other sovereign.

This attenuation, coupled with the existing deterrence effected by the denial of use of the evidence by either sovereign in the criminal trials with which the searching officer is concerned, creates a situation in which the imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest. The extension of the exclusionary rule, in our view, would be an unjustifiably drastic action by the courts in the pursuit of what is an undesired and undesirable supervisory role over police officers.[35] See *Rizzo* v. *Goode,* 423 U. S. 362 (1976).

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[35] To the extent that recent cases state that deterrence is the prime purpose of the exclusionary rule, and that "judicial integrity" is a relevant, albeit subordinate factor, we hold that in this case considerations of judicial integrity do not require exclusion of the evidence.

Judicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment. The requirement that a defendant must have standing to make a motion to suppress demonstrates as much. See *Alderman* v. *United States,* 394 U. S. 165 (1969).

The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage

In the past this Court has opted for exclusion in the anticipation that law enforcement officers would be deterred from violating Fourth Amendment rights. Then, as now, the Court acted in the absence of convincing empirical evidence and relied, instead, on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system. In the situation before us, we do not find sufficient justification for the drastic measure of an exclusionary rule. There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches. We find ourselves at that point in this case. We therefore hold that the judicially

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violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. See *United States* v. *Calandra*, 414 U. S., at 347, 354. The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose. See *United States* v. *Peltier*, 422 U. S., at 538; *Michigan* v. *Tucker*, 417 U. S., at 450 n. 25. The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment. The admission of evidence in a federal civil proceeding is simply not important enough to state criminal law enforcement officers to encourage them to violate Fourth Amendment rights (and thus to obtain evidence that they are unable to use in either state or federal criminal proceedings). In addition, the officers here were clearly acting in good faith, see n. 1, *supra*, a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion. See *Michigan* v. *Tucker*, 417 U. S., at 447; *United States* v. *Peltier*, 422 U. S., at 539.

created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I adhere to my view that the exclusionary rule is a necessary and inherent constitutional ingredient of the protections of the Fourth Amendment. See *United States* v. *Calandra,* 414 U. S. 338, 355–367 (1974) (BRENNAN, J., dissenting), and *United States* v. *Peltier,* 422 U. S. 531, 550–562 (1975) (BRENNAN, J., dissenting). Repetition or elaboration of the reasons supporting that view in this case would serve no useful purpose. My view of the exclusionary rule would, of course, require an affirmance of the Court of Appeals. Today's decisions in this case and in *Stone* v. *Powell, post,* p. 465, continue the Court's "business of slow strangulation of the rule," 422 U. S., at 561. But even accepting the proposition that deterrence of police misconduct is the only purpose served by the exclusionary rule, as my Brother STEWART apparently does, his dissent persuasively demonstrates the error of today's result. I dissent.

MR. JUSTICE STEWART, dissenting.

The Court today holds that evidence unconstitutionally seized from the respondent by state officials may be introduced against him in a proceeding to adjudicate his

liability under the wagering excise tax provisions of the Internal Revenue Code of 1954. This result, in my view, cannot be squared with *Elkins* v. *United States,* 364 U. S. 206. In that case the Court discarded the "silver platter doctrine" and held that evidence illegally seized by state officers cannot lawfully be introduced against a defendant in a federal criminal trial.

Unless the *Elkins* doctrine is to be abandoned, evidence illegally seized by state officers must be excluded as well from federal proceedings to determine liability under the federal wagering excise tax provisions. These provisions, constituting an "interrelated statutory system for taxing wagers," *Marchetti* v. *United States,* 390 U. S. 39, 42, operate in an area "permeated with criminal statutes" and impose liability on a group "inherently suspect of criminal activities." *Albertson* v. *SACB,* 382 U. S. 70, 79, quoted in *Marchetti* v. *United States, supra,* at 47. While the enforcement of these provisions results in the collection of revenue, "we cannot ignore either the characteristics of the activities" which give rise to wagering tax liability "or the composition of the group" from which payment is sought. *Grosso* v. *United States,* 390 U. S. 62, 68. The wagering provisions are intended not merely to raise revenue but also to "assist the efforts of state and federal authorities to enforce [criminal] penalties" for unlawful wagering activities. *Marchetti* v. *United States, supra,* at 47.

Federal officials responsible for the enforcement of the wagering tax provisions regularly cooperate with federal and local officials responsible for enforcing criminal laws restricting or forbidding wagering. See 390 U. S., at 47–48. Similarly, federal and local law enforcement personnel regularly provide federal tax officials with information, obtained in criminal investigations, indicating

liability under the wagering tax.* The pattern is one of mutual cooperation and coordination, with the federal wagering tax provisions buttressing state and federal criminal sanctions.

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*The parties here stipulated as follows:

"On December 3, 1968, Leonard Weissman, a Los Angeles Police Department officer, informed Morris Nimovitz, a revenue officer of the Internal Revenue Service, that the plaintiff herein had been arrested for alleged bookmaking activities. Officer Weissman was the same person who had prepared the affidavit in support of the search warrant which had been quashed by Judge Lang on the basis of an insufficient affidavit in support thereof. Mr. Nimovitz proceeded to the Los Angeles Police Department and with the help of Officer Weissman, analyzed certain betting markers and information which had been seized pursuant to the aforementioned search warrant. On the basis of their analysis, the gross volume of bookmaking activities alleged to have been conducted by the plaintiff herein and Morris Aaron Levine was determined for the five days immediately preceding the arrest of the plaintiff herein and Morris Aaron Levine. Officer Weissman further informed Mr. Nimovitz that he had commenced his investigation of the plaintiff herein on September 14, 1968, which continued on an intermittent basis through November 30, 1968, the date of the arrest. On the basis of the information given by Officer Weissman to Mr. Nimovitz, the civil tax assessment was made by taking five days of activities as determined from the items seized pursuant to the aforementioned search warrant and multiplying the daily gross volume times 77 days, to wit, the period of Officer Weissman's intermittent surveillance (September 14, 1968 through November 30, 1968)."

Officer Weissman stated as follows in a deposition:

"Q Now, Sergeant Weissman, is it police department policy to call the Internal Revenue Service when you have taken a substantial sum of cash related to a bookmaking arrest?

"A I don't think that there's policy either way. I just—I did it as a matter of—I wouldn't say it was policy. I did it as a matter of police procedure.

"In other words, here's a person that was involved in a crime that had this kind of money, and I thought of Internal Revenue.

"Q Do you do that on a regular basis?

[*Footnote is continued on p. 463*]

Given this pattern, our observation in *Elkins* is directly opposite:

> "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that . . . at least tacitly [invites federal officers] to encourage state officers in the disregard of constitutionally protected freedom." 364 U. S., at 221–222.

To be sure, the *Elkins* case was a federal criminal proceeding and the present case is civil in nature. But our prior decisions make it clear that this difference is irrelevant for Fourth Amendment exclusionary rule purposes where, as here, the civil proceeding serves as an adjunct to the enforcement of the criminal law. See *Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693.

The Court's failure to heed these precedents not only rips a hole in the fabric of the law but leads to a result that cannot even serve the valid arguments of those who would eliminate the exclusionary rule entirely. For under the Court's ruling, society must not only continue to pay the high cost of the exclusionary rule (by forgoing criminal convictions which can be obtained only on the basis of illegally seized evidence) but it must also forfeit the benefit for which it has paid so dearly.

If state police officials can effectively crack down on gambling law violators by the simple expedient of violating their constitutional rights and turning the illegally seized evidence over to Internal Revenue Service agents on the proverbial "silver platter," then the deter-

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"A I don't do it on what I would consider a small-size book, but I considered this one a major-size book. So, I, therefore, did it.

"Q Would you do that with every major-size book that you run across with a substantial amount of cash?

"A I probably would."

rent purpose of the exclusionary rule is wholly frustrated. "If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation." *Elkins* v. *United States*, *supra*, at 222.

# STONE, WARDEN *v.* POWELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–1055. Argued February 24, 1976—Decided July 6, 1976*

Respondent in No. 74–1055, was convicted of murder in state court, in part on the basis of testimony concerning a revolver found on his person when he was arrested for violating a vagrancy ordinance. The trial court rejected respondent's contention that the testimony should have been excluded because the ordinance was unconstitutional and the arrest therefore invalid. The appellate court affirmed, finding it unnecessary to pass upon the legality of the arrest and search because of the court's conclusion that the error, if any, in admitting the challenged testimony was harmless, beyond a reasonable doubt. Respondent then applied for habeas corpus relief in the Federal District Court, which concluded that the arresting officer had probable cause and that even if the vagrancy ordinance was unconstitutional the deterrent purpose of the exclusionary rule did not require that it be applied to bar admission of the fruits of a search incident to an otherwise valid arrest. The court held, alternatively, that any error in admission of the challenged evidence was harmless. The Court of Appeals reversed, concluding that the ordinance was unconstitutional; that respondent's arrest was therefore illegal; and that, although exclusion of the evidence would serve no deterrent purpose with regard to officers who were enforcing statutes in good faith, exclusion would deter legislators from enacting unconstitutional statutes. The court also held that admission of the evidence was not harmless error. In No. 74–1222, respondent was also convicted of murder in a state court, in part on the basis of evidence seized pursuant to a search warrant which respondent on a suppression motion claimed was invalid. The trial court denied respondent's motion to suppress, and was upheld on appeal. Respondent then filed a habeas corpus petition in Federal District Court. The court concluded that the warrant was invalid, and rejected the State's contention that in any event probable cause justified the

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*Together with No. 74–1222, *Wolff, Warden* v. *Rice*, on certiorari to the United States Court of Appeals for the Eighth Circuit.

search. The Court of Appeals affirmed. *Held:* Where the State, as in each of these cases, has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal as compared to the substantial societal costs of applying the rule. Pp. 474–495.

(a) Until these cases this Court has had no occasion fully to examine the validity of the assumption made in *Kaufman* v. *United States,* 394 U. S. 217, that the effectuation of the Fourth Amendment, as applied to the States through the Fourteenth, requires the granting of habeas corpus relief when a prisoner has been convicted in state court on the basis of evidence obtained in an illegal search or seizure since those Amendments were held in *Mapp* v. *Ohio,* 367 U. S. 643, to require exclusion of such evidence at trial and reversal of conviction upon direct review. Pp. 480–481.

(b) The *Mapp* majority justified application of the exclusionary rule chiefly upon the belief that exclusion would deter future unlawful police conduct, and though preserving the integrity of the judicial process has been alluded to as also justifying the rule, that concern is minimal where federal habeas corpus relief is sought by a prisoner who has already been given the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review. Pp. 484–486.

(c) Despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons; in various situations the Court has found the policies behind the rule outweighed by countervailing considerations. Pp. 486–489.

(d) The ultimate question of guilt or innocence should be the central concern in a criminal proceeding. Application of the exclusionary rule, however, deflects the truthfinding process and often frees the guilty. Though the rule is thought to deter unlawful police activity, in part through nurturing respect for Fourth Amendment values, indiscriminate application of the rule may well generate disrespect for the law and the administration of justice. Pp. 489–491.

(e) Despite the absence of supportive empirical evidence, the assumption has been that the exclusionary rule deters law enforce-

ment officers from violating the Fourth Amendment by removing the incentives to disregard it. Though the Court adheres to that view as applied to the trial and direct-appeal stages, there is no reason to believe that the effect of applying the rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Even if some additional deterrent effect existed from application of the rule in isolated habeas corpus cases, the furtherance of Fourth Amendment goals would be outweighed by the detriment to the criminal justice system. Pp. 492–494.

No. 74–1055, 507 F. 2d 93; No. 74–1222, 513 F. 2d 1280, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 496. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 502. WHITE, J., filed a dissenting opinion, *post*, p. 536.

*Robert R. Granucci*, Deputy Attorney General of California, argued the cause for petitioner in No. 74–1055. With him on the briefs were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney General, and *Clifford K. Thompson, Jr.*, *Thomas A. Brady*, and *Ronald E. Niver*, Deputy Attorneys General. *Melvin Kent Kammerlohr*, Assistant Attorney General of Nebraska, argued the cause for petitioner in No. 74–1222. With him on the brief was *Paul L. Douglas*, Attorney General.

*Robert W. Peterson*, by appointment of the Court, 423 U. S. 817, argued the cause and filed a brief for respondent in No. 74–1055. *William C. Cunningham* argued the cause for respondent in No. 74–1222. With him on the brief was *J. Patrick Green*.†

† Briefs of *amici curiae* urging reversal in No. 74–1222 were filed by *Bruce E. Babbitt*, Attorney General, *Shirley H. Frondorf*, and *Frank T. Galati*, Assistant Attorneys General, and *William J. Schafer*

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents in these cases were convicted of criminal offenses in state courts, and their convictions were affirmed on appeal. The prosecution in each case relied upon evidence obtained by searches and seizures alleged by respondents to have been unlawful. Each respondent subsequently sought relief in a Federal District Court by filing a petition for a writ of federal habeas corpus under

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*III*, for the State of Arizona; by *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Chief Deputy Attorney General, *Richard L. Chambers*, Deputy Attorney General, and *G. Thomas Davis*, Senior Assistant Attorney General, for the State of Georgia; by *Theodore L. Sendak*, Attorney General, and *Donald P. Bogard*, Assistant Attorney General, of Indiana, and *Richard C. Turner*, Attorney General of Iowa, for the States of Indiana and Iowa; and by *Vernon B. Romney*, Attorney General, and *William W. Barrett*, Assistant Attorney General, for the State of Utah.

*John J. Cleary* filed a brief for the California Public Defenders Assn. as *amicus curiae* urging affirmance in No. 74–1055. Briefs of *amici curiae* urging affirmance in No. 74–1222 were filed by *Mary M. Kaufman* for the National Alliance Against Racist and Political Repression; by *Henry W. McGee, Jr.*, for the National Conference of Black Lawyers; by *Jonathan M. Hyman* for the National Lawyers' Guild et al.; and by *Theodore A. Gottfried* and *Robert E. Davison* for the National Legal Aid and Defender Assn.

*Leon Friedman*, *Melvin L. Wulf*, and *Joel M. Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* in both cases. Briefs of *amici curiae* in No. 74–1222 were filed by *Robert L. Shevin*, Attorney General, and *Stephen R. Koons*, Assistant Attorney General, for the State of Florida; by *William F. Hyland*, Attorney General, *David S. Baime*, *John DeCicco*, and *Daniel Louis Grossman*, Deputy Attorneys General, for the State of New Jersey; by *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Lillian Z. Cohen*, Assistant Attorney General, for the State of New York; and by *Frank Carrington*, *Fred E. Inbau*, *Wayne W. Schmidt*, *James R. Thompson*, and *William K. Lambie* for Americans for Effective Law Enforcement, Inc., et al.

28 U. S. C. § 2254. The question presented is whether a federal court should consider, in ruling on a petition for habeas corpus relief filed by a state prisoner, a claim that evidence obtained by an unconstitutional search or seizure was introduced at his trial, when he has previously been afforded an opportunity for full and fair litigation of his claim in the state courts. The issue is of considerable importance to the administration of criminal justice.

## I

We summarize first the relevant facts and procedural history of these cases.

### A

Respondent Lloyd Powell was convicted of murder in June 1968 after trial in a California state court. At about midnight on February 17, 1968, he and three companions entered the Bonanza Liquor Store in San Bernardino, Cal., where Powell became involved in an altercation with Gerald Parsons, the store manager, over the theft of a bottle of wine. In the scuffling that followed Powell shot and killed Parsons' wife. Ten hours later an officer of the Henderson, Nev., Police Department arrested Powell for violation of the Henderson vagrancy ordinance,[1] and in the search incident to the arrest discovered a .38-caliber revolver with six expended cartridges in the cylinder.

Powell was extradited to California and convicted of

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[1] The ordinance provides:

"Every person is a vagrant who:

"[1] Loiters or wanders upon the streets or from place to place without apparent reason or business and [2] who refuses to identify himself and to account for his presence when asked by a police officer to do so [3] if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

second-degree murder in the Superior Court of San Bernardino County. Parsons and Powell's accomplices at the liquor store testified against him. A criminologist testified that the revolver found on Powell was the gun that killed Parsons' wife. The trial court rejected Powell's contention that testimony by the Henderson police officer as to the search and the discovery of the revolver should have been excluded because the vagrancy ordinance was unconstitutional. In October 1969, the conviction was affirmed by a California District Court of Appeal. Although the issue was duly presented, that court found it unnecessary to pass upon the legality of the arrest and search because it concluded that the error, if any, in admitting the testimony of the Henderson officer was harmless beyond a reasonable doubt under *Chapman* v. *California,* 386 U. S. 18 (1967). The Supreme Court of California denied Powell's petition for habeas corpus relief.

In August 1971 Powell filed an amended petition for a writ of federal habeas corpus under 28 U. S. C. § 2254 in the United States District Court for the Northern District of California, contending that the testimony concerning the .38-caliber revolver should have been excluded as the fruit of an illegal search. He argued that his arrest had been unlawful because the Henderson vagrancy ordinance was unconstitutionally vague, and that the arresting officer lacked probable cause to believe that he was violating it. The District Court concluded that the arresting officer had probable cause and held that even if the vagrancy ordinance was unconstitutional, the deterrent purpose of the exclusionary rule does not require that it be applied to bar admission of the fruits of a search incident to an otherwise valid arrest. In the alternative, that court agreed with the California District Court of Appeal that the admission of the evidence con-

cerning Powell's arrest, if error, was harmless beyond a reasonable doubt.

In December 1974, the Court of Appeals for the Ninth Circuit reversed. 507 F. 2d 93. The court concluded that the vagrancy ordinance was unconstitutionally vague,[2] that Powell's arrest was therefore illegal, and that although exclusion of the evidence would serve no deterrent purpose with regard to police officers who were enforcing statutes in good faith, exclusion would serve the public interest by deterring legislators from enacting unconstitutional statutes. *Id.*, at 98. After an independent review of the evidence the court concluded that the admission of the evidence was not harmless error since it supported the testimony of Parsons and Powell's accomplices. *Id.*, at 99.

B

Respondent David Rice was convicted of murder in April 1971 after trial in a Nebraska state court. At 2:05 a. m. on August 17, 1970, Omaha police received a telephone call that a woman had been heard screaming at 2867 Ohio Street. As one of the officers sent to that address examined a suitcase lying in the doorway, it exploded, killing him instantly. By August 22 the investigation of the murder centered on Duane Peak, a 15-year-old member of the National Committee to Com-

[2] In support of the vagueness holding the court relied principally on *Papachristou* v. *Jacksonville*, 405 U. S. 156 (1972), where we invalidated a city ordinance in part defining vagrants as "persons wandering or strolling around from place to place without any lawful purpose or object . . . ." *Id.*, at 156–157, n. 1. Noting the similarity between the first element of the Henderson ordinance, see n. 1, *supra*, and the Jacksonville ordinance, it concluded that the second and third elements of the Henderson ordinance were not sufficiently specific to cure its overall vagueness. 507 F. 2d, at 95–97. Petitioner Stone challenges these conclusions, but in view of our disposition of the case we need not consider this issue.

bat Fascism (NCCF), and that afternoon a warrant was issued for Peak's arrest. The investigation also focused on other known members of the NCCF, including Rice, some of whom were believed to be planning to kill Peak before he could incriminate them. In their search for Peak, the police went to Rice's home at 10:30 that night and found lights and a television on, but there was no response to their repeated knocking. While some officers remained to watch the premises, a warrant was obtained to search for explosives and illegal weapons believed to be in Rice's possession. Peak was not in the house, but upon entering the police discovered, in plain view, dynamite, blasting caps, and other materials useful in the construction of explosive devices. Peak subsequently was arrested, and on August 27, Rice voluntarily surrendered. The clothes Rice was wearing at that time were subjected to chemical analysis, disclosing dynamite particles.

Rice was tried for first-degree murder in the District Court of Douglas County. At trial Peak admitted planting the suitcase and making the telephone call, and implicated Rice in the bombing plot. As corroborative evidence the State introduced items seized during the search, as well as the results of the chemical analysis of Rice's clothing. The court denied Rice's motion to suppress this evidence. On appeal the Supreme Court of Nebraska affirmed the conviction, holding that the search of Rice's home had been pursuant to a valid search warrant. *State* v. *Rice*, 188 Neb. 728, 199 N. W. 2d 480 (1972).

In September 1972 Rice filed a petition for a writ of habeas corpus in the United States District Court for Nebraska. Rice's sole contention was that his incarceration was unlawful because the evidence underlying his conviction had been discovered as the result of an illegal

search of his home. The District Court concluded that the search warrant was invalid, as the supporting affidavit was defective under *Spinelli* v. *United States,* 393 U. S. 410 (1969), and *Aguilar* v. *Texas,* 378 U. S. 108 (1964). 388 F. Supp. 185, 190–194 (1974).[3] The court also rejected the State's contention that even if the warrant was invalid the search was justified because of the valid arrest warrant for Peak and because of the exigent circumstances of the situation—danger to Peak and search for bombs and explosives believed in possession of the NCCF. The court reasoned that the arrest warrant did not justify the entry as the police lacked probable cause to believe Peak was in the house, and further concluded that the circumstances were not sufficiently exigent to justify an immediate warrantless

[3] The sole evidence presented to the magistrate was the affidavit in support of the warrant application. It indicated that the police believed explosives and illegal weapons were present in Rice's home because (1) Rice was an official of the NCCF, (2) a violent killing of an officer had occurred and it appeared that the NCCF was involved, and (3) police had received information in the past that Rice possessed weapons and explosives, which he had said should be used against the police. See 388 F. Supp., at 189 n. 1. In concluding that there existed probable cause for issuance of the warrant, although the Nebraska Supreme Court found the affidavit alone sufficient, it also referred to information contained in testimony adduced at the suppression hearing but not included in the affidavit. 188 Neb. 728, 738–739, 199 N. W. 2d 480, 487–488. See also *id.,* at 754, 199 N. W. 2d, at 495 (concurring opinion). The District Court limited its probable-cause inquiry to the face of the affidavit, see *Spinelli* v. *United States,* 393 U. S., at 413 n. 3; *Aguilar* v. *Texas,* 378 U. S., at 109 n. 1, and concluded probable cause was lacking. Petitioner Wolff contends that police should be permitted to supplement the information contained in an affidavit for a search warrant at the hearing on a motion to suppress, a contention that we have several times rejected, see, *e. g., Whiteley* v. *Warden,* 401 U. S. 560, 565 n. 8 (1971); *Aguilar* v. *Texas, supra,* at 109 n. 1, and need not reach again here.

search. *Id.*, at 194–202.[4] The Court of Appeals for the Eighth Circuit affirmed, substantially for the reasons stated by the District Court. 513 F. 2d 1280 (1975).

Petitioners Stone and Wolff, the wardens of the respective state prisons where Powell and Rice are incarcerated, petitioned for review of these decisions, raising questions concerning the scope of federal habeas corpus and the role of the exclusionary rule upon collateral review of cases involving Fourth Amendment claims. We granted their petitions for certiorari. 422 U. S. 1055 (1975).[5] We now reverse.

## II

The authority of federal courts to issue the writ of habeas corpus *ad subjiciendum*[6] was included in the first

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[4] The District Court further held that the evidence of dynamite particles found on Rice's clothing should have been suppressed as the tainted fruit of an arrest warrant that would not have been issued but for the unlawful search of his home. 388 F. Supp., at 202–207. See *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).

[5] In the orders granting certiorari in these cases we requested that counsel in *Stone* v. *Powell* and *Wolff* v. *Rice* respectively address the questions:

"Whether, in light of the fact that the District Court found that the Henderson, Nev., police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as a result of a search incident to that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U. S. C. § 2254.

"Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U. S. C. § 2254."

[6] It is now well established that the phrase "habeas corpus" used alone refers to the common-law writ of habeas corpus *ad subjicien-*

grant of federal-court jurisdiction, made by the Judiciary Act of 1789, c. 20, § 14, 1 Stat. 81, with the limitation that the writ extend only to prisoners held in custody by the United States. The original statutory authorization did not define the substantive reach of the writ. It merely stated that the courts of the United States "shall have power to issue writs of . . . *habeas corpus* . . . ." *Ibid.* The courts defined the scope of the writ in accordance with the common law and limited it to an inquiry as to the jurisdiction of the sentencing tribunal. See, *e. g.*, *Ex parte Watkins*, 3 Pet. 193 (1830) (Marshall, C. J.).

In 1867 the writ was extended to state prisoners. Act of Feb. 5, 1867, c. 28, § 1, 14 Stat. 385. Under the 1867 Act federal courts were authorized to give relief in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ." But the limitation of federal habeas corpus jurisdiction to consideration of the jurisdiction of the sentencing court persisted. See, *e. g.*, *In re Wood*, 140 U. S. 278 (1891); *In re Rahrer*, 140 U. S. 545 (1891); *Andrews* v. *Swartz*, 156 U. S. 272 (1895); *Bergemann* v. *Backer*, 157 U. S. 655 (1895); *Pettibone* v. *Nichols*, 203 U. S. 192 (1906). And, although the concept of "jurisdiction" was subjected to considerable strain as the substantive scope of the writ was expanded,[7] this

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*dum*, known as the "Great Writ." *Ex parte Bollman*, 4 Cranch 75, 95 (1807) (Marshall, C. J.).

[7] Prior to 1889 there was, in practical effect, no appellate review in federal criminal cases. The possibility of Supreme Court review on certificate of division of opinion in the circuit court was remote because of the practice of single district judges' holding circuit court. See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1539–1540 (2d ed. 1973); F. Frankfurter & J. Landis, The Business of the Supreme Court 31–32, 79–80, and n. 107 (1927). Pressure naturally developed for expansion of the scope of habeas corpus to reach otherwise

expansion was limited to only a few classes of cases[8] until *Frank* v. *Mangum*, 237 U. S. 309, in 1915. In *Frank*, the prisoner had claimed in the state courts that the proceedings which resulted in his conviction for murder had been dominated by a mob. After the State Supreme Court rejected his contentions, Frank unsuccessfully sought habeas corpus relief in the Federal District Court. This Court affirmed the denial of relief because Frank's federal claims had been considered by a competent and unbiased state tribunal. The Court recognized, however, that if a habeas corpus court found that the State had failed to provide adequate "corrective process" for the full and fair litigation of federal claims, whether or not "jurisdictional," the court could inquire into the merits to determine whether a detention was lawful. *Id.*, at 333–336.

In the landmark decision in *Brown* v. *Allen*, 344 U. S. 443, 482–487 (1953), the scope of the writ was expanded still further.[9] In that case and its companion case, *Daniels* v. *Allen*, state prisoners applied for federal habeas corpus relief claiming that the trial courts had erred

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unreviewable decisions involving fundamental rights. See *Ex parte Siebold*, 100 U. S. 371, 376–377 (1880); Bator, Finality in Criminal Law and Federal Habeas Corpus For State Prisoners, 76 Harv. L. Rev. 441, 473, and n. 75 (1963).

[8] The expansion occurred primarily with regard to (i) convictions based on assertedly unconstitutional statutes, *e. g.*, *Ex parte Siebold*, *supra*, or (ii) detentions based upon an allegedly illegal sentence, *e. g.*, *Ex parte Lange*, 18 Wall. 163 (1874). See Bator, *supra*, n. 7, at 465–474.

[9] There has been disagreement among scholars as to whether the result in *Brown* v. *Allen* was foreshadowed by the Court's decision in *Moore* v. *Dempsey*, 261 U. S. 86 (1923). Compare Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 105 (1959); Reitz, Federal Habeas Corpus; Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1328–1329 (1961), with Bator, *supra*, n. 7, at 488–491. See also *Fay* v. *Noia*, 372 U. S. 391, 421, and n. 30 (1963); *id.*, at 457–460 (Harlan, J., dissenting).

in failing to quash their indictments due to alleged discrimination in the selection of grand jurors and in ruling certain confessions admissible. In *Brown,* the highest court of the State had rejected these claims on direct appeal, *State* v. *Brown,* 233 N. C. 202, 63 S. E. 2d 99, and this Court had denied certiorari, 341 U. S. 943 (1951). Despite the apparent adequacy of the state corrective process, the Court reviewed the denial of the writ of habeas corpus and held that Brown was entitled to a full reconsideration of these constitutional claims, including, if appropriate, a hearing in the Federal District Court. In *Daniels,* however, the State Supreme Court on direct review had refused to consider the appeal because the papers were filed out of time. This Court held that since the state-court judgment rested on a reasonable application of the State's legitimate procedural rules, a ground that would have barred direct review of his federal claims by this Court, the District Court lacked authority to grant habeas corpus relief. See 344 U. S., at 458, 486.

This final barrier to broad collateral re-examination of state criminal convictions in federal habeas corpus proceedings was removed in *Fay* v. *Noia,* 372 U. S. 391 (1963).[10] Noia and two codefendants had been convicted

[10] Despite the expansion of the scope of the writ, there has been no change in the established rule with respect to nonconstitutional claims. The writ of habeas corpus and its federal counterpart, 28 U. S. C. § 2255, "will not be allowed to do service for an appeal." *Sunal* v. *Large,* 332 U. S. 174, 178 (1947). For this reason, nonconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings. *Id.,* at 178–179; *Davis* v. *United States,* 417 U. S. 333, 345–346, and n. 15 (1974). Even those nonconstitutional claims that could not have been asserted on direct appeal can be raised on collateral review only if the alleged error constituted " 'a fundamental defect which inherently results in a complete miscarriage of justice,' " *id.,* at 346, quoting *Hill* v. *United States,* 368 U. S. 424, 428 (1962).

of felony murder. The sole evidence against each defendant was a signed confession. Noia's codefendants, but not Noia himself, appealed their convictions. Although their appeals were unsuccessful, in subsequent state proceedings they were able to establish that their confessions had been coerced and their convictions therefore procured in violation of the Constitution. In a subsequent federal habeas corpus proceeding, it was stipulated that Noia's confession also had been coerced, but the District Court followed *Daniels* in holding that Noia's failure to appeal barred habeas corpus review. See *United States* v. *Fay*, 183 F. Supp. 222, 225 (SDNY 1960). The Court of Appeals reversed, ordering that Noia's conviction be set aside and that he be released from custody or that a new trial be granted. This Court affirmed the grant of the writ, narrowly restricting the circumstances in which a federal court may refuse to consider the merits of federal constitutional claims.[11]

During the period in which the substantive scope of the writ was expanded, the Court did not consider whether exceptions to full review might exist with respect

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[11] In construing broadly the power of a federal district court to consider constitutional claims presented in a petition for writ of habeas corpus, the Court in *Fay* also reaffirmed the equitable nature of the writ, noting that "[d]iscretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require.' 28 U. S. C. § 2243." 372 U. S., at 438. More recently, in *Francis* v. *Henderson*, 425 U. S. 536 (1976), holding that a state prisoner who failed to make a timely challenge to the composition of the grand jury that indicted him cannot bring such a challenge in a post-conviction federal habeas corpus proceeding absent a claim of actual prejudice, we emphasized:

"This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power. See *Fay* v. *Noia*, 372 U. S. 391, 425–426." *Id.*, at 539.

to particular categories of constitutional claims. Prior to the Court's decision in *Kaufman* v. *United States,* 394 U. S. 217 (1969), however, a substantial majority of the Federal Courts of Appeals had concluded that collateral review of search-and-seizure claims was inappropriate on motions filed by federal prisoners under 28 U. S. C. § 2255, the modern postconviction procedure available to federal prisoners in lieu of habeas corpus.[12] The primary rationale advanced in support of those decisions was that Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." 394 U. S., at 224. See *Thornton* v. *United States,* 125 U. S. App. D. C. 114, 368 F. 2d 822 (1966).

*Kaufman* rejected this rationale and held that search-and-seizure claims are cognizable in § 2255 proceedings. The Court noted that "the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial," 394 U. S., at 225, citing, *e. g., Mancusi* v. *DeForte,* 392

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[12] Compare, *e. g., United States* v. *Re,* 372 F. 2d 641 (CA2), cert. denied, 388 U. S. 912 (1967); *United States* v. *Jenkins,* 281 F. 2d 193 (CA3 1960); *Eisner* v. *United States,* 351 F. 2d 55 (CA6 1965); *De Welles* v. *United States,* 372 F. 2d 67 (CA7), cert denied, 388 U. S. 919 (1967); *Williams* v. *United States,* 307 F. 2d 366 (CA9 1962); *Armstead* v. *United States,* 318 F. 2d 725 (CA5 1963), with, *e. g., United States* v. *Sutton,* 321 F. 2d 221 (CA4 1963); *Gaitan* v. *United States,* 317 F. 2d 494 (CA10 1963). See also *Thornton* v. *United States,* 125 U. S. App. D. C. 114, 368 F. 2d 822 (1966) (search-and-seizure claims not cognizable under § 2255 absent special circumstances).

U. S. 364 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968), and concluded, as a matter of statutory construction, that there was no basis for restricting "access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners," 394 U. S., at 226. Although in recent years the view has been expressed that the Court should re-examine the substantive scope of federal habeas jurisdiction and limit collateral review of search-and-seizure claims "solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts," *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 250 (1973) (POWELL, J., concurring),[13] the Court, without discussion or consideration of the issue, has continued to accept jurisdiction in cases raising such claims. See *Lefkowitz* v. *Newsome*, 420 U. S. 283 (1975); *Cady* v. *Dombrowski*, 413 U. S. 433 (1973); *Cardwell* v. *Lewis*, 417 U. S. 583 (1974) (plurality opinion).[14]

The discussion in *Kaufman* of the scope of federal habeas corpus rests on the view that the effectuation of the Fourth Amendment, as applied to the States through the Fourteenth Amendment, requires the granting of habeas corpus relief when a prisoner has been con-

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[13] See, *e. g.*, Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970).

[14] In *Newsome* the Court focused on the issue whether a state defendant's plea of guilty waives federal habeas corpus review where state law does not foreclose review of the plea on direct appeal, and did not consider the substantive scope of the writ. See 420 U. S., at 287 n. 4. Similarly, in *Cardwell* and *Cady* the question considered here was not presented in the petition for certiorari, and in neither case was relief granted on the basis of a search-and-seizure claim. In *Cardwell* the plurality expressly noted that it was not addressing the issue of the substantive scope of the writ. See 417 U. S., at 596, and n. 12.

victed in state court on the basis of evidence obtained in an illegal search or seizure since those Amendments were held in *Mapp* v. *Ohio,* 367 U. S. 643 (1961), to require exclusion of such evidence at trial and reversal of conviction upon direct review.[15] Until these cases we have not had occasion fully to consider the validity of this view. See, *e. g., Schneckloth* v. *Bustamonte, supra,* at 249 n. 38; *Cardwell* v. *Lewis, supra,* at 596, and n. 12. Upon examination, we conclude, in light of the nature and purpose of the Fourth Amendment exclusionary rule, that this view is unjustified.[16] We hold, therefore, that

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[15] As Mr. Justice Black commented in dissent, 394 U. S., at 231, 239, the *Kaufman* majority made no effort to justify its result in light of the long-recognized deterrent purpose of the exclusionary rule. Instead, the Court relied on a series of prior cases as implicitly establishing the proposition that search-and-seizure claims are cognizable in federal habeas corpus proceedings. See *Mancusi* v. *DeForte,* 392 U. S. 364 (1968); *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Warden* v. *Hayden,* 387 U. S. 294 (1967). But only in *Mancusi* did this Court order habeas relief on the basis of a search-and-seizure claim, and in that case, as well as in *Warden,* the issue of the substantive scope of the writ was not presented to the Court in the petition for writ of certiorari. Moreover, of the other "numerous occasions" cited by MR. JUSTICE BRENNAN's dissent, *post,* at 518–519, in which the Court has accepted jurisdiction over collateral attacks by state prisoners raising Fourth Amendment claims, in only one case—*Whiteley* v. *Warden,* 401 U. S. 560 (1971)—was relief granted on that basis. And in *Whiteley,* as in *Mancusi,* the issue of the substantive scope of the writ was not presented in the petition for certiorari. As emphasized by Mr. Justice Black, only in the most exceptional cases will we consider issues not raised in the petition. 394 U. S., at 239, and n. 7.

[16] The issue in *Kaufman* was the scope of § 2255. Our decision today rejects the dictum in *Kaufman* concerning the applicability of the exclusionary rule in federal habeas corpus review of state-court decisions pursuant to § 2254. To the extent the application of the exclusionary rule in *Kaufman* did not rely upon the supervisory role of this Court over the lower federal courts, cf. *Elkins* v.

where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.[17]

## III

The Fourth Amendment assures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies, *Stanford* v. *Texas*, 379 U. S. 476, 481–485 (1965); *Frank* v. *Maryland*, 359 U. S. 360, 363–365 (1959), and was intended to protect the "sanctity of a man's home and the privacies of life," *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), from searches under unchecked general authority.[18]

The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment. Prior to the Court's decisions in *Weeks* v. *United States*, 232 U. S. 383 (1914), and *Gouled* v. *United States*, 255 U. S. 298 (1921), there existed no barrier to the introduction in criminal trials of evidence obtained in violation of the Amendment. See *Adams* v. *New York*,

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*United States*, 364 U. S. 206 (1960), see *infra*, at 484, the rationale for its application in that context is also rejected.

[17] We find it unnecessary to consider the other issues concerning the exclusionary rule, or the statutory scope of the habeas corpus statute, raised by the parties. These include, principally, whether in view of the purpose of the rule, it should be applied on a *per se* basis without regard to the nature of the constitutional claim or the circumstances of the police action.

[18] See generally J. Landynski, Search and Seizure and the Supreme Court (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937).

192 U. S. 585 (1904).[19] In *Weeks* the Court held that the defendant could petition before trial for the return of property secured through an illegal search or seizure conducted by federal authorities. In *Gouled* the Court held broadly that such evidence could not be introduced in a federal prosecution. See *Warden* v. *Hayden*, 387 U. S. 294, 304–305 (1967). See also *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920) (fruits of illegally seized evidence). Thirty-five years after *Weeks* the Court held in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), that the right to be free from arbitrary intrusion by the police that is protected by the Fourth Amendment is "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the [Fourteenth Amendment] Due Process Clause." *Id.*, at 27–28. The Court concluded, however, that the *Weeks* exclusionary rule would not be imposed upon the States as "an essential ingredient of [that] right." 338 U. S., at 29. The full force of *Wolf* was eroded in subsequent decisions, see *Elkins* v. *United States*, 364 U. S. 206 (1960); *Rea* v. *United States*, 350 U. S. 214 (1956), and a little more than a decade later the exclusionary rule was held applicable to the States in *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

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[19] The roots of the *Weeks* decision lay in an early decision, *Boyd* v. *United States*, 116 U. S. 616 (1886), where the Court held that the compulsory production of a person's private books and papers for introduction against him at trial violated the Fourth and Fifth Amendments. *Boyd*, however, had been severely limited in *Adams* v. *New York*, where the Court, emphasizing that the "law held unconstitutional [in *Boyd*] virtually compelled the defendant to furnish testimony against himself," 192 U. S., at 598, adhered to the common-law rule that a trial court must not inquire, on Fourth Amendment grounds, into the method by which otherwise competent evidence was acquired. See, *e. g.*, *Commonwealth* v. *Dana*, 43 Mass. 329 (1841).

Decisions prior to *Mapp* advanced two principal reasons for application of the rule in federal trials. The Court in *Elkins*, for example, in the context of its special supervisory role over the lower federal courts, referred to the "imperative of judicial integrity," suggesting that exclusion of illegally seized evidence prevents contamination of the judicial process. 364 U. S., at 222.[20] But even in that context a more pragmatic ground was emphasized:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.*, at 217.

The *Mapp* majority justified the application of the rule to the States on several grounds,[21] but relied principally upon the belief that exclusion would deter future unlawful police conduct. 367 U. S., at 658.

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[20] See *Terry* v. *Ohio*, 392 U. S. 1, 12–13 (1968); *Weeks* v. *United States*, 232 U. S. 383, 391–392, 394 (1914); *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (Holmes, J., dissenting); *id.*, at 484 (Brandeis, J., dissenting).

[21] See 367 U. S., at 656 (prevention of introduction of evidence where introduction is "tantamount" to a coerced confession); *id.*, at 658 (deterrence of Fourth Amendment violations); *id.*, at 659 (preservation of judicial integrity).

Only four Justices adopted the view that the Fourth Amendment itself requires the exclusion of unconstitutionally seized evidence in state criminal trials. See *id.*, at 656; *id.*, at 666 (Douglas, J., concurring). Mr. Justice Black adhered to his view that the Fourth Amendment, standing alone, was not sufficient, see *Wolf* v. *Colorado*, 338 U. S. 25, 39 (1949) (concurring opinion), but concluded that, when the Fourth Amendment is considered in conjunction with the Fifth Amendment ban against compelled self-incrimination, a constitutional basis emerges for requiring exclusion. 367 U. S., at 661 (concurring opinion). See n. 19, *supra*.

Although our decisions often have alluded to the "imperative of judicial integrity," *e. g., United States* v. *Peltier,* 422 U. S. 531, 536–539 (1975), they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context.[22] Logically extended this justification would require that courts exclude unconstitutionally seized evidence despite lack of objection by the defendant, or even over his assent. Cf. *Henry* v. *Mississippi,* 379 U. S. 443 (1965). It also would require abandonment of the standing limitations on who may object to the introduction of unconstitutionally seized evidence, *Alderman* v. *United States,* 394 U. S. 165 (1969), and retreat from the proposition that judicial proceedings need not abate when the defendant's person is unconstitutionally seized, *Gerstein* v. *Pugh,* 420 U. S. 103, 119 (1975); *Frisbie* v. *Collins,* 342 U. S. 519 (1952). Similarly, the interest in promoting judicial integrity does not prevent the use of illegally seized evidence in grand jury proceedings. *United States* v. *Calandra,* 414 U. S. 338 (1974). Nor does it require that the trial court exclude such evidence from use for impeachment of a defendant, even though its introduction is certain to result in conviction in some cases. *Walder* v. *United States,* 347 U. S. 62 (1954). The teaching of these cases is clear. While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.[23]

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[22] See Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 5–6, and n. 33 (1975).

[23] As we recognized last Term, judicial integrity is "not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the

The force of this justification becomes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review.

The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any "[r]eparation comes too late." *Linkletter* v. *Walker*, 381 U. S. 618, 637 (1965). Instead,

> "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." *United States* v. *Calandra*, *supra*, at 348.

Accord, *United States* v. *Peltier*, *supra*, at 538–539; *Terry* v. *Ohio*, 392 U. S. 1, 28–29 (1968); *Linkletter* v. *Walker*, *supra*, at 636–637; *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 416 (1966).

*Mapp* involved the enforcement of the exclusionary rule at state trials and on direct review. The decision in *Kaufman*, as noted above, is premised on the view that implementation of the Fourth Amendment also requires the consideration of search-and-seizure claims upon collateral review of state convictions. But despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. As in the case of any remedial device, "the application of the rule has been restricted to those areas where its reme-

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Constitution." *United States* v. *Peltier*, 422 U. S. 531, 538 (1975) (emphasis omitted).

dial objectives are thought most efficaciously served." *United States* v. *Calandra, supra,* at 348.[24] Thus, our refusal to extend the exclusionary rule to grand jury proceedings was based on a balancing of the potential injury to the historic role and function of the grand jury by such extension against the potential contribution to the effectuation of the Fourth Amendment through deterrence of police misconduct:

> "Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. . . . We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially

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[24] As Professor Amsterdam has observed:

"The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law-enforcing officers.' As it serves this function, the rule is a needed, but grud[g]ingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest . . . ." Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 388–389 (1964) (footnotes omitted).

impeding the role of the grand jury." 414 U. S., at 351–352 (footnote omitted).

The same pragmatic analysis of the exclusionary rule's usefulness in a particular context was evident earlier in *Walder* v. *United States, supra,* where the Court permitted the Government to use unlawfully seized evidence to impeach the credibility of a defendant who had testified broadly in his own defense. The Court held, in effect, that the interests safeguarded by the exclusionary rule in that context were outweighed by the need to prevent perjury and to assure the integrity of the trial process. The judgment in *Walder* revealed most clearly that the policies behind the exclusionary rule are not absolute. Rather, they must be evaluated in light of competing policies. In that case, the public interest in determination of truth at trial [25] was deemed to outweigh the incremental contribution that might have been made to the protection of Fourth Amendment values by application of the rule.

The balancing process at work in these cases also finds expression in the standing requirement. Standing to invoke the exclusionary rule has been found to exist only when the Government attempts to use illegally obtained evidence to incriminate the victim of the illegal search. *Brown* v. *United States,* 411 U. S. 223 (1973); *Alderman* v. *United States,* 394 U. S. 165 (1969); *Wong Sun* v. *United States,* 371 U. S. 471, 491–492 (1963). See *Jones* v. *United States,* 362 U. S. 257, 261 (1960). The standing requirement is premised on the view that the "additional benefits of extending the . . . rule" to defendants other than the victim of the search or seizure are outweighed by the "further encroachment upon the

[25] See generally M. Frankel, The Search For Truth—An Umpireal View, 31st Annual Benjamin N. Cardozo Lecture, Association of the Bar of the City of New York, Dec. 16, 1974.

public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States, supra,* at 174–175.[26]

## IV

We turn now to the specific question presented by these cases. Respondents allege violations of Fourth Amendment rights guaranteed them through the Fourteenth Amendment. The question is whether state prisoners—who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review—may invoke their claim again on federal habeas corpus review. The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.

The costs of applying the exclusionary rule even at trial and on direct review are well known: [27] the focus

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[26] Cases addressing the question whether search-and-seizure holdings should be applied retroactively also have focused on the deterrent purpose served by the exclusionary rule, consistently with the balancing analysis applied generally in the exclusionary rule context. See *Desist* v. *United States,* 394 U. S. 244, 249–251, 253–254, and n. 21 (1969); *Linkletter* v. *Walker,* 381 U. S. 618, 636–637 (1965). Cf. *Fuller* v. *Alaska,* 393 U. S. 80, 81 (1968). The "attenuation-of-the-taint" doctrine also is consistent with the balancing approach. See *Brown* v. *Illinois,* 422 U. S. 590 (1975); *Wong Sun* v. *United States,* 371 U. S., at 491–492; Amsterdam, *supra,* n. 24, at 389–390.

[27] See, *e. g., Irvine* v. *California,* 347 U. S. 128, 136 (1954); *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 411 (1971) (BURGER, C. J., dissenting); *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585 (1926) (Cardozo, J.); 8 J. Wigmore, Evidence § 2184a, pp. 51–52 (McNaughton ed. 1961); Amsterdam, *supra,* n. 24, at 388–391; Friendly, *supra,* n. 13, at 161; Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 736–754 (1970), and

of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.[28] Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. As Mr. Justice Black emphasized in his dissent in *Kaufman:*

> "A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty." 394 U. S., at 237.

Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.[29] Thus,

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sources cited therein; Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. C. & P. S. 255, 256 (1961); Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L. Rev. 736 (1972).

[28] See address by Justice Schaefer of the Supreme Court of Illinois, Is the Adversary System Working in Optimal Fashion?, delivered at the National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice, pp. 8–9, Apr. 8, 1976; cf. Frankel, *supra*, n. 25.

[29] Many of the proposals for modification of the scope of the exclusionary rule recognize at least implicitly the role of proportionality in the criminal justice system and the potential value of establishing a direct relationship between the nature of the violation and the decision whether to invoke the rule. See ALI, A

although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.[30] These long-recognized costs of the rule persist when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts.[31]

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Model Code of Pre-arraignment Procedure, § 290.2, pp. 181–183 (1975) ("substantial violations"); H. Friendly, Benchmarks 260–262 (1967) (even at trial, exclusion should be limited to "the fruit of activity intentionally or flagrantly illegal"); 8 Wigmore, *supra*, n. 27, at 52–53. See n. 17, *supra*.

[30] In a different context, Dallin H. Oaks has observed:

"I am criticizing, not our concern with procedures, but our preoccupation, in which we may lose sight of the fact that our procedures are not the ultimate goals of our legal system. Our goals are truth and justice, and procedures are but means to these ends. . . .

"Truth and justice are ultimate values, so understood by our people, and the law and the legal profession will not be worthy of public respect and loyalty if we allow our attention to be diverted from these goals." Ethics, Morality and Professional Responsibility, 1975 B. Y. U. L. Rev. 591, 596.

[31] Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Schneckloth* v. *Bustamonte*, 412 U. S., at 259 (POWELL, J., concurring). See also *Kaufman* v. *United States*, 394 U. S., at 231 (Black, J., dissenting); Friendly, *supra*, n. 13.

We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against

Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence,[32] we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.[33]

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compelling an innocent man to suffer an unconstitutional loss of liberty. The Court in *Fay* v. *Noia* described habeas corpus as a remedy for "whatever society deems to be intolerable restraints," and recognized that those to whom the writ should be granted "are persons whom society has grievously wronged." 372 U. S., at 401, 441. But in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration.

[32] The efficacy of the exclusionary rule has long been the subject of sharp debate. Until recently, scholarly empirical research was unavailable. *Elkins* v. *United States*, 364 U. S., at 218. And, the evidence derived from recent empirical research is still inconclusive. Compare, *e. g.*, Oaks, *supra*, n. 27; Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Studies 243 (1973), with, *e. g.*, Canon, Is the Exclusionary Rule in Failing Health?, Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L. J. 681 (1974). See *United States* v. *Janis*, *ante*, at 450–452, n. 22; Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 475 n. 593 (1974); Comment, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 Nw. U. L. Rev. 740 (1974).

[33] See Oaks, *supra*, n. 27, at 756.

We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions. But the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs. To be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions.[34] Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant. The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal.[35] Even if one rationally could assume that

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[34] "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." Amsterdam, *supra*, n. 24, at 389.

[35] The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through

some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.

In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim,[36] a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.[37] In this context the

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fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 341–344 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse." Bator, *supra*, n. 7, at 509.

[36] Cf. *Townsend* v. *Sain*, 372 U. S. 293 (1963).

[37] Mr. Justice Brennan's dissent characterizes the Court's opinion as laying the groundwork for a "drastic withdrawal of federal habeas jurisdiction, if not for all grounds . . . , then at least [for many] . . . ." *Post*, at 517. It refers variously to our opinion as a "novel reinterpretation of the habeas statutes," *post*, at 515; as a "harbinger of future eviscerations of the habeas statutes," *post*, at 516; as "rewrit[ing] Congress' jurisdictional statutes . . . and [bar-

contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force.[38]

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ring] access to federal courts by state prisoners with constitutional claims distasteful to a majority" of the Court, *post*, at 522; and as a "denigration of constitutional guarantees [that] must appall citizens taught to expect judicial respect" of constitutional rights, *post*, at 523.

With all respect, the hyperbole of the dissenting opinion is misdirected. Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, see *supra*, at 486, and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding. As Mr. Justice Black recognized in this context, "ordinarily the evidence seized can in no way have been rendered untrustworthy . . . and indeed often . . . alone establishes beyond virtually any shadow of a doubt that the defendant is guilty." *Kaufman* v. *United States*, 394 U. S., at 237 (dissenting opinion). In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation.

[38] See n. 31, *supra*. Respondents contend that since they filed petitions for federal habeas corpus rather than seeking direct review by this Court through an application for a writ of certiorari, and since the time to apply for certiorari has now passed, any diminution in their ability to obtain habeas corpus relief on the ground evidence obtained in an unconstitutional search or seizure was introduced at their trials should be prospective. Cf. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 422–423 (1964). We reject these contentions. Although not required to do so under the Court's prior decisions, see *Fay* v. *Noia*, 372 U. S. 391 (1963), respondents were, of course, free to file a timely petition for certiorari prior to seeking federal habeas corpus relief.

Accordingly, the judgments of the Courts of Appeals are

*Reversed.*

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the Court's opinion. By way of dictum, and somewhat hesitantly, the Court notes that the holding in this case leaves undisturbed the exclusionary rule as applied to criminal trials. For reasons stated in my dissent in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 411 (1971), it seems clear to me that the exclusionary rule has been operative long enough to demonstrate its flaws. The time has come to modify its reach, even if it is retained for a small and limited category of cases.

Over the years, the strains imposed by reality, in terms of the costs to society and the bizarre miscarriages of justice that have been experienced because of the exclusion of reliable evidence when the "constable blunders," have led the Court to vacillate as to the rationale for deliberate exclusion of truth from the factfinding process. The rhetoric has varied with the rationale to the point where the rule has become a doctrinaire result in search of validating reasons.

In evaluating the exclusionary rule, it is important to bear in mind exactly what the rule accomplishes. Its function is simple—the exclusion of truth from the factfinding process. Cf. M. Frankel, The Search for Truth—An Umpireal View, 31st Annual Benjamin N. Cardozo Lecture, Association of the Bar of the City of New York, Dec. 16, 1974. The operation of the rule is therefore unlike that of the Fifth Amendment's protection against compelled self-incrimination. A confession produced after intimidating or coercive interrogation is inherently dubious. If a suspect's will has been overborne, a cloud

hangs over his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability. This is not the case as to *reliable* evidence—a pistol, a packet of heroin, counterfeit money, or the body of a murder victim—which may be judicially declared to be the result of an "unreasonable" search. The reliability of such evidence is beyond question; its probative value is certain.

This remarkable situation—one unknown to the common-law tradition—had its genesis in a case calling for the protection of private papers against governmental intrusions. *Boyd* v. *United States,* 116 U. S. 616 (1886). See also *Weeks* v. *United States,* 232 U. S. 383 (1914). In *Boyd,* the Court held that private papers were inadmissible because of the Government's violation of the Fourth and Fifth Amendments. In *Weeks,* the Court excluded private letters seized from the accused's home by a federal official acting without a warrant. In both cases, the Court had a clear vision of what it was seeking to protect. What the Court said in *Boyd* shows how far we have strayed from the original path:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, *are totally different things from a search for and seizure of a man's private books and papers* for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.*" 116 U. S., at 623. (Emphasis added.)

In *Weeks,* the Court emphasized that the Government, under settled principles of common law, had no right to keep a person's *private papers.* The Court noted that the case did not involve "burglar's tools or other *proofs of guilt* . . . ." 232 U. S., at 392. (Emphasis added.)

From this origin, the exclusionary rule has been

changed in focus entirely. It is now used almost exclusively to exclude from evidence articles which are unlawful to be possessed or tools and instruments of crime. Unless it can be rationally thought that the Framers considered it essential to protect the liberties of the people to hold that which it is unlawful to possess, then it becomes clear that our constitutional course has taken a most bizarre tack.

The drastically changed nature of judicial concern—from the protection of personal papers or effects in one's private quarters, to the exclusion of that which the accused had no right to possess—is only one of the more recent anomalies of the rule. The original incongruity was the rule's inconsistency with the general proposition that "our legal system does not attempt to do justice incidentally and to enforce penalties by indirect means." 8 J. Wigmore, Evidence § 2181, p. 6 (McNaughten ed. 1961). The rule is based on the hope that events in the courtroom or appellate chambers, long after the crucial acts took place, will somehow modify the way in which policemen conduct themselves. A more clumsy, less direct means of imposing sanctions is difficult to imagine, particularly since the issue whether the policeman did indeed run afoul of the Fourth Amendment is often not resolved until years after the event. The "sanction" is particularly indirect when, as in No. 74–1222, the police go before a magistrate, who issues a warrant. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Imposing an admittedly indirect "sanction" on the police officer in that instance is nothing less than sophisticated nonsense.

Despite this anomaly, the exclusionary rule now rests upon its purported tendency to deter police misconduct, *United States* v. *Janis, ante,* p. 433; *United States* v.

*Calandra,* 414 U. S. 338, 347 (1974), although, as we know, the rule has long been applied to wholly good-faith mistakes and to purely technical deficiencies in warrants. Other rhetorical generalizations, including the "imperative of judicial integrity," have not withstood analysis as more and more critical appraisals of the rule's operation have appeared. See, *e. g.,* Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). Indeed, settled rules demonstrate that the "judicial integrity" rationalization is fatally flawed. First, the Court has refused to entertain claims that evidence was unlawfully seized unless the claimant could demonstrate that he had standing to press the contention. *Alderman* v. *United States,* 394 U. S. 165 (1969). If he could not, the evidence, albeit secured in violation of the Fourth Amendment, is admissible. Second, as one scholar has correctly observed:

> "[I]t is difficult to accept the proposition that the exclusion of improperly obtained evidence is necessary for 'judicial integrity' when no such rule is observed in other common law jurisdictions such as England and Canada, whose courts are otherwise regarded as models of judicial decorum and fairness." Oaks, *supra,* at 669.

Despite its avowed deterrent objective, proof is lacking that the exclusionary rule, a purely judge-created device based on "hard cases," serves the purpose of deterrence. Notwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect. In the face of dwindling support for the rule some would go so far as to extend it to *civil* cases. *United States* v. *Janis, ante,* p. 433.

To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention—and surely its *extension*—to demonstrate that

it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law. See, *e. g., Killough* v. *United States,* 114 U. S. App. D. C. 305, 315 F. 2d 241 (1962). The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade.

In my view, it is an abdication of judicial responsibility to exact such exorbitant costs from society purely on the basis of speculative and unsubstantiated assumptions. Judge Henry Friendly has observed:

> "[T]he same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach." The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 952–953 (1965).

In *Bivens,* I suggested that, despite its grave shortcomings, the rule need not be totally abandoned until some meaningful alternative could be developed to protect innocent persons aggrieved by police misconduct. With the passage of time, it now appears that the continued existence of the rule, as presently implemented, inhibits the development of rational alternatives. The reason is quite simple: Incentives for developing new procedures or remedies will remain minimal or nonexistent so long as the exclusionary rule is retained in its present form.

It can no longer be assumed that other branches of government will act while judges cling to this Draconian, discredited device in its present absolutist form. Legislatures are unlikely to create statutory alternatives, or im-

pose direct sanctions on errant police officers or on the public treasury by way of tort actions, so long as persons who commit serious crimes continue to reap the enormous and undeserved benefits of the exclusionary rule. And of course, by definition the direct beneficiaries of this rule can be none but persons guilty of crimes. With this extraordinary "remedy" for Fourth Amendment violations, however slight, inadvertent, or technical, legislatures might assume that nothing more should be done, even though a grave defect of the exclusionary rule is that it offers no relief whatever to victims of overzealous police work who never appear in court. Schaefer, The Fourteenth Amendment and Sanctity of the Person, 64 Nw. U. L. Rev. 1, 14 (1969). And even if legislatures were inclined to experiment with alternative remedies, they have no assurance that the judicially created rule will be abolished or even modified in response to such legislative innovations. The unhappy result, as I see it, is that alternatives will inevitably be stymied by rigid adherence on our part to the exclusionary rule. I venture to predict that overruling this judicially contrived doctrine—or limiting its scope to egregious, bad-faith conduct—would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistakes or misconduct.

The Court's opinion today eloquently reflects something of the dismal social costs occasioned by the rule. *Ante*, at 489–491. As MR. JUSTICE WHITE correctly observes today in his dissent, the exclusionary rule constitutes a "senseless obstacle to arriving at the truth in many criminal trials." *Post*, at 538. He also suggests that the rule be substantially modified "so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with exist-

ing law and having reasonable grounds for this belief." *Ibid.*

From its genesis in the desire to protect private papers, the exclusionary rule has now been carried to the point of potentially excluding from evidence the traditional *corpus delicti* in a murder or kidnaping case. See *People* v. *Mitchell*, 39 N. Y. 2d 173, 347 N. E. 2d 607, cert. denied, 426 U. S. 953 (1976). Cf. *Killough* v. *United States, supra.* Expansion of the reach of the exclusionary rule has brought Cardozo's grim prophecy in *People* v. *Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 588 (1926), nearer to fulfillment:

> "A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. . . . We may not subject society to these dangers until the Legislature has spoken with a clearer voice."

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The Court today holds "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Ante*, at 494. To be sure, my Brethren are hostile to the continued vitality of the exclusionary rule as part and parcel of the Fourth Amendment's prohibition of unreasonable searches and seizures, as today's decision in *United States* v. *Janis, ante*, p. 433, confirms. But these cases, despite the veil of Fourth Amendment terminology employed by the

Court, plainly do not involve any question of the right of a defendant to have evidence excluded from use against him in his criminal trial when that evidence was seized in contravention of rights ostensibly secured [1] by the Fourth and Fourteenth Amendments. Rather, they involve the question of the availability of a *federal forum* for vindicating those federally guaranteed rights. Today's holding portends substantial evisceration of federal habeas corpus jurisdiction, and I dissent.

The Court's opinion does not specify the particular basis on which it denies federal habeas jurisdiction over claims of Fourth Amendment violations brought by state prisoners. The Court insists that its holding is based on the Constitution, see, *e. g., ante,* at 482, but in light of the explicit language of 28 U. S. C. § 2254 [2] (signifi-

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[1] I say "ostensibly" secured both because it is clear that the Court has yet to make its final frontal assault on the exclusionary rule, and because the Court has recently moved in the direction of holding that the Fourth Amendment has no substantive content whatsoever. See, *e. g., United States* v. *Martinez-Fuerte, post,* at 567–569 (BRENNAN, J., dissenting), and cases cited therein.

[2] Title 28 U. S. C. § 2254 provides:

"§ 2254. State custody; remedies in State courts.

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning

cantly not even mentioned by the Court), I can only presume that the Court intends to be understood to hold either that respondents are not, as a matter of statutory

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of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made,

construction, "in custody in violation of the Constitution or laws . . . of the United States," or that " 'considerations of comity and concerns for the orderly administration of criminal justice,' " *ante,* at 478 n. 11,[3] are sufficient

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unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

[3] Title 28 U. S. C. § 2243 provides:

"§ 2243. Issuance of writ; return; hearing; decision.

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within

to allow this Court to rewrite jurisdictional statutes enacted by Congress. Neither ground of decision is tenable; the former is simply illogical, and the latter is an arrogation of power committed solely to the Congress.

## I

Much of the Court's analysis implies that respondents are not entitled to habeas relief because they are not being unconstitutionally detained. Although purportedly adhering to the principle that the Fourth and Fourteenth Amendments "require exclusion" of evidence seized in violation of their commands, *ante*, at 481, the Court informs us that there has merely been a "view" in our cases that "the effectuation of the Fourth Amendment . . . requires the granting of habeas corpus relief when a prisoner has been convicted in state court on the basis of evidence obtained in an illegal search or seizure . . . ." *Ante*, at 480–481.[4] Applying a "balancing

three days unless for good cause additional time, not exceeding twenty days, is allowed.

"The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

"When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

"The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

"The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

[4] See also, *e. g.*, *ante*, at 486 ("The decision in *Kaufman* [v. *United States*, 394 U. S. 217 (1969),] is premised on the view that implementation of the Fourth Amendment also requires the consideration of search-and-seizure claims upon collateral review of state convic-

test," see, *e. g., ante,* at 487–489, 489–490, 493–494, the Court then concludes that this "view" is unjustified and that the policies of the Fourth Amendment would not be implemented if claims to the benefits of the exclusionary rule were cognizable in collateral attacks on state-court convictions.[5]

Understandably the Court must purport to cast its holding in constitutional terms, because that avoids a direct confrontation with the incontrovertible facts that the habeas statutes have heretofore always been construed to grant jurisdiction to entertain Fourth Amendment claims of both state and federal prisoners, that Fourth Amendment principles have been applied in decisions on the merits in numerous cases on collateral review of final convictions, and that Congress has legislatively accepted our interpretation of congressional intent as to

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tions"); *ante,* at 489 ("The answer [to the question whether Fourth Amendment claims may be raised by state prisoners in federal habeas corpus proceedings] is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims"); *ante,* at 493 ("[T]he additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs. . . . The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal"); *ante,* at 494–495 ("In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force").

[5] To the extent the Court is rendering a constitutional holding, there is obviously no distinction between claims brought by state prisoners under 28 U. S. C. § 2254 and those brought by federal prisoners under 28 U. S. C. § 2255. Thus, the Court overrules not only a long line of cases concerning availability of habeas relief for state prisoners, but also a similarly inveterate line of cases concerning availability of counterpart § 2255 relief for federal prisoners.

the necessary scope and function of habeas relief. Indeed, the Court reaches its result without explicitly overruling any of our plethora of precedents inconsistent with that result or even discussing principles of *stare decisis*. Rather, the Court asserts, in essence, that the Justices joining those prior decisions or reaching the merits of Fourth Amendment claims simply overlooked the obvious constitutional dimension to the problem in adhering to the "view" that granting collateral relief when state courts erroneously decide Fourth Amendment issues would effectuate the principles underlying that Amendment.[6] But, shorn of the rhetoric of "interest balancing"

[6] Mr. Justice Black, dissenting in *Kaufman* v. *United States*, 394 U. S. 217 (1969), argued that in light of his view of the purposes of the exclusionary rule Fourth Amendment claims should not, as a matter of statutory construction, be cognizable on federal habeas. However, he never made the suggestion, apparently embraced by the Court today, that such claims cannot as a constitutional matter be entertained on habeas jurisdiction, even though Congress fashioned that jurisdiction at least in part to compensate for the inadequacies inherent in our certiorari jurisdiction on direct review. Cf. *ante*, at 481 n. 15, and 490. Indeed, *Kaufman* did not ignore the dissenting Justices' arguments; rather, it noted that habeas jurisdiction, apart from any effect on police behavior, serves the independent function of "insur[ing] the integrity of proceedings at and before trial where constitutional rights are at stake." 394 U. S., at 225. See also *infra*, at 519–522. As to the argument that our prior cases do not resolve the issue decided today because "only in the most exceptional cases will we consider issues not raised in the petition," see *ante*, at 481 n. 15, that claim is only valid to the extent the issue is one of construing congressional intent as to when, with respect to cases properly within the district court's power to grant relief, habeas relief should nevertheless be denied as a matter of discretion. But to the extent a person against whom unconstitutionally seized evidence was admitted at trial after a full and fair hearing is not "in custody in violation of the Constitution," there would be no jurisdiction even to entertain a habeas petition, see n. 2, *supra*, and such subject-matter-jurisdiction questions are always open—and must be resolved—at any stage of federal litigation. See, *e. g.*,

used to obscure what is at stake in this case, it is evident that today's attempt to rest the decision on the Constitution must fail so long as *Mapp* v. *Ohio,* 367 U. S. 643 (1961), remains undisturbed.

Under *Mapp,* as a matter of federal constitutional law, a state court *must* exclude evidence from the trial of an individual whose Fourth and Fourteenth Amendment rights were violated by a search or seizure that directly or indirectly resulted in the acquisition of that evidence. As *United States* v. *Calandra,* 414 U. S. 338, 347 (1974), reaffirmed, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." [7] When a state court admits such evidence, it has committed a *constitutional* error, and unless that error is harmless under federal standards, see, *e. g., Chapman* v. *California,* 386 U. S. 18 (1967), it follows ineluctably that the defendant has been placed "in custody in violation of the Constitution" within the comprehension of 28 U. S. C. § 2254. In short, it escapes me as to what logic can support the assertion that the defendant's unconstitutional confinement obtains during the process of direct review, no matter how long that process takes,[8]

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*Louisville & Nashville R. Co.* v. *Mottley,* 211 U. S. 149 (1908); Fed. Rule Civ. Proc. 12 (h). It borders on the incredible to suggest that so many Justices for so long merely "assumed" the answer to such a basic jurisdictional question.

[7] See also 414 U. S., at 351, noting "inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim."

[8] Only once does the Court advert to any temporal distinction between direct review and collateral review as a possible reason for precluding the raising of Fourth Amendment claims during the former and not during the latter proceedings. See *ante,* at 493 (arguing that deterrence would not be "enhanced" by the risk "that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring

but that the unconstitutionality then suddenly dissipates at the moment the claim is asserted in a collateral attack on the conviction.

The only conceivable rationale upon which the Court's "constitutional" thesis might rest is the statement that "the [exclusionary] rule is not a personal constitutional right. . . . Instead, 'the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" *Ante*, at 486, quoting *United States* v. *Calandra*, *supra*, at 348. Although my dissent in *Calandra* rejected, in light of contrary decisions establishing the role of the exclusionary rule, the premise that an individual has no constitutional right to have unconstitutionally seized evidence excluded from all use by the government, I need not dispute that point here.[9] For today's holding is not logically defensible even under *Calandra*. However the Court reinterprets *Mapp*, and whatever the rationale now attributed to *Mapp*'s holding or the purpose ascribed to the exclusionary rule, the prevailing constitutional *rule* is that unconstitutionally seized evidence *cannot be admitted* in the criminal trial of a person whose federal constitutional rights were violated by the search or seizure. The erroneous admission of such evidence is a violation of the Federal Constitution—*Mapp* inexorably means at least this much, or there would be no basis for applying the exclusionary rule in state criminal proceedings—and an

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years after the incarceration of the defendant"). Of course, it is difficult to see how the Court could constitutionalize any such asserted temporal distinctions, particularly in light of the differential speed with which criminal cases proceed even on direct appeal.

[9] It is unnecessary here to expand upon my reasons for disagreement, which are stated fully in my dissents in *United States* v. *Calandra*, 414 U. S., at 355–367, and *United States* v. *Peltier*, 422 U. S. 531, 550–562 (1975).

accused against whom such evidence is admitted has been convicted in derogation of rights mandated by, and is "in custody in violation of," the Constitution of the United States. Indeed, since state courts violate the strictures of the Federal Constitution by admitting such evidence, then even if federal habeas review did not directly effectuate Fourth Amendment values, a proposition I deny, that review would nevertheless serve to effectuate what is concededly a constitutional principle concerning admissibility of evidence at trial.

The Court, assuming without deciding that respondents were convicted on the basis of unconstitutionally obtained evidence erroneously admitted against them by the state trial courts, acknowledges that respondents had the right to obtain a reversal of their convictions on appeal in the state courts or on certiorari to this Court. Indeed, since our rules relating to the time limits for applying for certiorari in criminal cases are nonjurisdictional, certiorari could be granted respondents even today and their convictions could be reversed despite today's decisions. See also *infra,* at 533–534. And the basis for reversing those convictions would of course have to be that the States, in rejecting respondents' Fourth Amendment claims, had deprived them of a right in derogation of the Federal Constitution. It is simply inconceivable that that constitutional deprivation suddenly vanishes after the appellate process has been exhausted. And as between this Court on certiorari, and federal district courts on habeas, it is for *Congress* to decide what the most efficacious method is for enforcing *federal* constitutional rights and asserting the primacy of federal law. See *infra,* at 522, 525–530. The Court, however, simply ignores the settled principle that for purposes of adjudicating constitutional claims Congress, which has the power to do so under Art. III of the Constitution, has effectively

cast the district courts sitting in habeas in the role of surrogate Supreme Courts.[10]

Today's opinion itself starkly exposes the illogic of the Court's seeming premise that the rights recognized

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[10] The failure to confront this fact forthrightly is obviously a core defect in the Court's analysis. For to the extent Congress has accorded the federal district courts a role in our constitutional scheme functionally equivalent to that of the Supreme Court with respect to review of state-court resolutions of federal constitutional claims, it is evident that the Court's direct/collateral review distinction for constitutional purposes simply collapses. Indeed, logically extended, the Court's analysis, which basically turns on the fact that law enforcement officials cannot anticipate a second court's finding constitutional errors after one court has fully and fairly adjudicated the claim and found it to be meritless, would preclude any Supreme Court review on direct appeal or even state appellate review if the trial court fairly addressed the Fourth Amendment claim on the merits. The proposition is certainly frivolous if *Mapp* is constitutionally grounded; yet such is the essential thrust of the Court's view that the unconstitutional admission of evidence is tolerable merely because police officials cannot be deterred from unconstitutional conduct by the possibility that a favorable "admission" decision would be followed by an unfavorable "exclusion" decision.

The Court's arguments respecting the cost/benefit analysis of applying the exclusionary rule on collateral attack also have no merit. For all of the "costs" of applying the exclusionary rule on habeas *should already have been incurred* at the trial or on direct review if the state court had not misapplied federal constitutional principles. As such, these "costs" were evaluated and deemed to be outweighed when the exclusionary rule was fashioned. The only proper question on habeas is whether federal courts, acting under congressional directive to have the last say as to enforcement of federal constitutional principles, are to permit the States free enjoyment of the fruits of a conviction which by definition were only obtained through violations of the Constitution as interpreted in *Mapp*. And as to the question whether any "educative" function is served by such habeas review, see *ante*, at 493, today's decision will certainly provide a lesson that, tragically for an individual's

in *Mapp* somehow suddenly evaporate after all direct appeals are exhausted. For the Court would not bar assertion of Fourth Amendment claims on habeas if the

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constitutional rights, will not be lost on state courts. See *infra*, at 530–533.

Another line of analysis exposes the fallacy of treating today's holding as a constitutional decision. Constitutionally, no barrier precludes a state defendant from immediately seeking a federal court's injunction against any state use of unconstitutionally seized evidence against him at trial. However, equitable principles have operated to foreclose cutting short the normal *initial* adjudication of such constitutional defenses in the course of a criminal prosecution, *Dombrowski* v. *Pfister*, 380 U. S. 479, 485 n. 3 (1965), subject to ultimate federal review either on direct review or collaterally through habeas. See also, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971). Moreover, considerations of comity, now statutorily codified as the exhaustion requirement of § 2254, and not lack of power, dictate that federal habeas review be delayed pending the initial state-court determination. But delay only was the price, "else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent." *Fay* v. *Noia*, 372 U. S. 391, 420 (1963); see *id.*, at 417–426. The Court today, however, converts this doctrine dictating the timing of federal review into a doctrine *precluding* federal review, see *Francis* v. *Henderson*, 425 U. S. 536, 542 (1976) (BRENNAN, J., dissenting); such action is in keeping with the regrettable recent trend of barring the federal courthouse door to individuals with meritorious claims. See, *e. g.*, *Warth* v. *Seldin*, 422 U. S. 490 (1975); *Rizzo* v. *Goode*, 423 U. S. 362 (1976); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26 (1976). Although the federal courts could have been the forum for the initial "opportunity for a full and fair hearing" of Fourth Amendment claims of state prisoners that the Court finds constitutionally sufficient, nonconstitutional concerns dictated temporary abstention; but having so abstained, federal courts are now ousted by this Court from ever determining the claims, since the courts to which they initially deferred are all that this Court deems necessary for protecting rights essential to preservation of the Fourth Amendment. Such hostility to federal jurisdiction to redress violations of rights secured by the Federal Constitution, despite congressional conferral of that jurisdiction, is profoundly disturbing.

defendant was not accorded "an opportunity for full and fair litigation of his claim in the state courts." *Ante,* at 469. See also *ante,* at 480, quoting *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 250 (1973) (POWELL, J., concurring); *ante,* at 482, 486, 489–490, 493–494, and n. 37. But this "exception" is impossible if the Court really means that the "rule" that Fourth Amendment claims are not cognizable on habeas is constitutionally based. For if the Constitution mandates that "rule" because it is a "dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal," *ante,* at 493, is it not an equally "dubious assumption" that those same police officials would fear that federal habeas review might reveal that the state courts had denied the defendant an opportunity to have a full and fair hearing on his claim that went undetected at trial and on appeal?[11] And to the extent the Court is making the unjustifiable assumption that our certiorari jurisdiction is adequate to correct "routine" condonation of Fourth Amendment violations by state courts, surely it follows *a fortiori* that our jurisdiction is adequate to redress the "egregious" situation in which the state courts did not even accord a fair hearing on the Fourth Amendment claim. The "exception" thus may appear to make the holding more palatable, but it merely highlights the lack of a "constitutional" rationale for today's constriction of habeas jurisdiction.

The Court adheres to the holding of *Mapp* that the Constitution "require[d] exclusion" of the evidence admitted at respondents' trials. *Ante,* at 481. However,

[11] In arguing in the Court's "deterrence" idiom, I emphasize that I am accepting the Court's assumptions concerning the purposes of the exclusionary rule only to demonstrate that, on its own premises, today's decision is unsupportable.

the Court holds that the Constitution "does not require" that respondents be accorded habeas relief if they were accorded "an opportunity for full and fair litigation of [their] Fourth Amendment claim[s]" in state courts. *Ante,* at 482; see also *ante,* at 495 n. 37. Yet once the Constitution was interpreted by *Mapp* to require exclusion of certain evidence at trial, the Constitution became irrelevant to the manner in which that constitutional right was to be enforced in the federal courts; *that* inquiry is only a matter of respecting Congress' allocation of federal judicial power between this Court's appellate jurisdiction and a federal district court's habeas jurisdiction. Indeed, by conceding that today's "decision does not mean that the federal [district] court lacks jurisdiction over [respondents'] claim[s]," *ibid.,* the Court admits that respondents have sufficiently alleged that they are "in custody in violation of the Constitution" within the meaning of § 2254 and that there is no "constitutional" rationale for today's holding. Rather, the constitutional "interest balancing" approach to this case is untenable, and I can only view the constitutional garb in which the Court dresses its result as a disguise for rejection of the longstanding principle that there are no "second class" constitutional rights for purposes of federal habeas jurisdiction; it is nothing less than an attempt to provide a veneer of respectability for an obvious usurpation of Congress' Art. III power to delineate the jurisdiction of the federal courts.

## II

Therefore, the real ground of today's decision—a ground that is particularly troubling in light of its portent for habeas jurisdiction generally—is the Court's novel reinterpretation of the habeas statutes; this would read the statutes as requiring the district courts rou-

tinely to deny habeas relief to prisoners "in custody in violation of the Constitution or laws . . . of the United States" as a matter of judicial "discretion"—a "discretion" judicially manufactured today contrary to the express statutory language—because such claims are "different in kind" from other constitutional violations in that they "do not 'impugn the integrity of the fact-finding process,'" *ante,* at 479, and because application of such constitutional strictures "often frees the guilty." *Ante,* at 490. Much in the Court's opinion suggests that a construction of the habeas statutes to deny relief for non-"guilt-related" constitutional violations, based on this Court's vague notions of comity and federalism, see, *e. g., ante,* at 478 n. 11, is the actual premise for today's decision, and although the Court attempts to bury its underlying premises in footnotes, those premises mark this case as a harbinger of future eviscerations of the habeas statutes that plainly does violence to congressional power to frame the statutory contours of habeas juridiction.[12] For we are told that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government," including waste of judicial resources, lack of finality of criminal convictions, friction between the federal and state judiciaries, and incursions on "federalism." *Ante,* at 491 n. 31. We are told that federal determination of Fourth Amendment claims merely involves "an issue that has no bearing on the basic justice of [the defend-

[12] For proof that my fears concerning the precedential use to which today's opinion will be put are not groundless, see, *e. g., Francis* v. *Henderson,* 425 U. S. 536 (1976), and *Estelle* v. *Williams,* 425 U. S. 501 (1976), which illustrate the Court's willingness to construe the habeas statutes so as to cabin the scope of habeas relief for criminal defendants.

ant's] incarceration," *ante,* at 492 n. 31, and that "the ultimate question [in the criminal process should invariably be] guilt or innocence." *Ante,* at 490; see also *ante,* at 491 n. 30; *ante,* at 490, quoting *Kaufman* v. *United States,* 394 U. S. 217, 237 (1969) (Black, J., dissenting). We are told that the "policy arguments" of respondents to the effect that federal courts must be the ultimate arbiters of federal constitutional rights, and that our certiorari jurisdiction is inadequate to perform this task, "stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights"; the Court, however, finds itself "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States," and asserts that it is "unpersuaded" by "the argument that federal judges are more expert in applying federal constitutional law" because "there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse.'" *Ante,* at 493–494, n. 35. Finally, we are provided a revisionist history of the genesis and growth of federal habeas corpus jurisdiction. *Ante,* at 474–482 (Part II). If today's decision were only that erroneous state-court resolution of Fourth Amendment claims did not render the defendant's resultant confinement "in violation of the Constitution," these pronouncements would have been wholly irrelevant and unnecessary. I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, *Miranda* viola-

tions, and use of invalid identification procedures [13]—that this Court later decides are not "guilt related."

To the extent the Court is actually premising its holding on an interpretation of 28 U. S. C. § 2241 or § 2254, it is overruling the heretofore settled principle that federal habeas relief is available to redress *any* denial of asserted constitutional rights, whether or not denial of the right affected the truth or fairness of the factfinding process. As MR. JUSTICE POWELL recognized in proposing that the Court re-evaluate the scope of habeas relief as a statutory matter in *Schneckloth* v. *Bustamonte*, 412 U. S., at 251 (concurring opinion), "on petition for habeas corpus or collateral review filed in a federal district court, whether by state prisoners under 28 U. S. C. § 2254 or federal prisoners under § 2255, the present rule is that Fourth Amendment claims may be asserted and the exclusionary rule must be applied in precisely the same manner as on direct review." This Court has on numerous occasions accepted jurisdiction over collateral attacks by state prisoners premised on Fourth Amendment violations, often over dissents that as a statutory matter such claims should not be cognizable. See, *e. g.*, *Lefkowitz* v. *Newsome*, 420 U. S. 283, 291–292, and nn. 8, 9 (1975); *Cardwell* v. *Lewis*, 417 U. S. 583 (1974); *Cady* v. *Dombrowski*, 413 U. S. 433 (1973); *Adams* v. *Williams*, 407 U. S. 143 (1972); *Whiteley* v. *Warden*, 401 U. S. 560 (1971); *Chambers* v. *Maroney*, 399 U. S. 42 (1970); *Har-*

[13] Others might be claims of official surveillance of attorney-client communications, government acquisition of evidence through unconscionable means, see, *e. g.*, *Rochin* v. *California*, 342 U. S. 165 (1952), denial of the right to a speedy trial, government administration of a "truth serum," see *Townsend* v. *Sain*, 372 U. S. 293 (1963), denial of the right to jury trial, see *Ludwig* v. *Massachusetts*, 427 U. S. 618, 627 n. 3 (1976), or the obtaining of convictions under statutes that contravene First Amendment rights when a properly drawn statute could have been applied to the particular defendant's conduct.

*ris* v. *Nelson*, 394 U. S. 286 (1969); *Mancusi* v. *DeForte*, 392 U. S. 364 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Warden* v. *Hayden*, 387 U. S. 294 (1967). Consideration of the merits in each of these decisions reaffirmed the unrestricted scope of habeas jurisdiction, but each decision must be deemed overruled by today's holding.[14]

Federal habeas corpus review of Fourth Amendment claims of state prisoners was merely one manifestation of the principle that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay* v. *Noia*, 372 U. S. 391, 424 (1963). This Court's precedents have been "premised in large part on a recognition that the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake. Our decisions leave no doubt that the federal habeas remedy extends

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[14] The overruling of *Lefkowitz* v. *Newsome*, decided only last Term, is particularly ironic. That case held that a state defendant could file a federal habeas corpus petition asserting Fourth Amendment claims, despite a subsequent guilty plea, when the State provided for appellate review of those claims. Three Justices dissented and would have held, as a statutory matter, that Fourth Amendment claims are not cognizable on federal habeas, but none suggested the "constitutional" thesis embraced by the Court as the ostensible *ratio decidendi* for today's cases.

Although the Court does not expressly overrule *Kaufman* v. *United States*, 394 U. S. 217 (1969), and its progeny involving collateral review of Fourth Amendment claims of federal prisoners (indeed, the Court accomplishes today's results without expressly overruling or distinguishing *any* of our diametrically contrary precedents), *Kaufman* obviously does not survive. This tactic has become familiar in earlier decisions this Term. See, *e. g.*, *Hudgens* v. *NLRB*, 424 U. S. 507 (1976); *Francis* v. *Henderson*, 425 U. S. 536 (1976); *Greer* v. *Spock*, 424 U. S. 828 (1976).

to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial." *Kaufman* v. *United States,* 394 U. S., at 225. Some of those decisions explicitly considered and rejected the "policies" referred to by the Court, *ante,* at 491–492, n. 31. *E. g., Brown* v. *Allen,* 344 U. S. 443 (1953); *Fay* v. *Noia, supra; Kaufman* v. *United States, supra.* There were no "assumptions" with respect to the construction of the habeas statutes, but reasoned decisions that those policies were an insufficient justification for shutting the federal habeas door to litigants with federal constitutional claims in light of such countervailing considerations as "the necessity that federal courts have the 'last say' with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, [and] the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions," 394 U. S., at 225–226, as well as the fundamental belief "that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Id.,* at 226. See generally, *e. g., Fay* v. *Noia, supra; Townsend* v. *Sain,* 372 U. S. 293 (1963). As Mr. Justice Harlan, who had dissented from many of the cases initially construing the habeas statutes, readily recognized, habeas jurisdiction as heretofore accepted by this Court was "not only concerned with those rules which substantially affect the fact-finding apparatus of the original trial. Under the prevailing notions, *Kaufman* v. *United States, supra,* at 224–226, *the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." Desist* v.

*United States,* 394 U. S. 244, 262–263 (1969) (dissenting) (emphasis supplied). The availability of collateral review assures "that the lower federal and state courts toe the constitutional line." *Id.,* at 264. "[H]abeas lies to inquire into every constitutional defect in any criminal trial, where the petitioner remains 'in custody' because of the judgment in that trial, unless the error committed was knowingly and deliberately waived or constitutes mere harmless error. That seems to be the implicit premise of *Brown* v. *Allen, supra,* and the clear purport of *Kaufman* v. *United States, supra.* . . . The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark." *Mackey* v. *United States,* 401 U. S. 667, 685–687 (1971) (opinion of Harlan, J.). See also *Brown* v. *Allen, supra,* at 508 (opinion of Frankfurter, J.) ("[N]o binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration of what procedurally may be deemed fairness, may have misconceived a federal constitutional right"); *Fay* v. *Noia, supra,* at 422. In effect, habeas jurisdiction is a deterrent to unconstitutional actions by trial and appellate judges, and a safeguard to ensure that rights secured under the Constitution and federal laws are not merely honored in the breach. "[I]ts function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Id.,* at 401–402. "[T]he historical role of the writ of habeas corpus [is that of] an effective and imperative remedy for detentions contrary to fundamental law." *Id.,* at 438.

At least since *Brown* v. *Allen, supra,* detention emanat-

ing from judicial proceedings in which constitutional rights were denied has been deemed "contrary to fundamental law," and all constitutional claims have thus been cognizable on federal habeas corpus. There is no foundation in the language or history of the habeas statutes for discriminating between types of constitutional transgressions, and efforts to relegate certain categories of claims to the status of "second-class rights" by excluding them from that jurisdiction have been repulsed.[15] Today's opinion, however, marks the triumph of those who have sought to establish a hierarchy of constitutional rights, and to deny for all practical purposes a federal forum for review of those rights that this Court deems less worthy or important. Without even paying the slightest deference to principles of *stare decisis* or acknowledging Congress' failure for two decades to alter the habeas statutes in light of our interpretation of congressional intent to render all federal constitutional contentions cognizable on habeas, the Court today rewrites Congress' jurisdictional statutes as heretofore construed and bars access to federal courts by state prisoners with constitutional claims distasteful to a majority of my Brethren. But even ignoring principles of *stare decisis* dictating that Congress is the appropriate vehicle for embarking on such a fundamental shift in the jurisdiction of the federal courts, I can find no adequate justification elucidated by the Court for concluding that habeas relief for all federal constitutional claims is no longer compelled under the reasoning of *Brown*, *Fay*, and *Kaufman*.

I would address the Court's concerns for effective utili-

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[15] My Brother WHITE's hypothesis of two confederates in crime, see *post*, at 536–537, fully demonstrates the type of discrimination that Congress clearly sought to avoid if, out of the full universe of constitutional rights, certain rights could be vindicated only by resort to this Court's certiorari jurisdiction.

zation of scarce judicial resources, finality principles, federal-state friction, and notions of "federalism" only long enough to note that such concerns carry no more force with respect to non-"guilt-related" constitutional claims than they do with respect to claims that affect the accuracy of the factfinding process. Congressional conferral of federal habeas jurisdiction for the purpose of entertaining petitions from state prisoners necessarily manifested a conclusion that such concerns could not be controlling, and any argument for discriminating among constitutional rights must therefore depend on the nature of the constitutional right involved.

The Court, focusing on Fourth Amendment rights as it must to justify such discrimination, thus argues that habeas relief for non-"guilt-related" constitutional claims is not mandated because such claims do not affect the "basic justice" of a defendant's detention, see *ante*, at 492 n. 31; this is presumably because the "ultimate goal" of the criminal justice system is "truth and justice." *E. g.*, *ante*, at 490, and 491 n. 30.[16] This denigration of constitutional guarantees and *constitutionally mandated procedures*, relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect and support for their constitutional rights. Even if punishment of the "guilty" were society's highest value—and procedural safeguards denigrated to this end—in a constitution that a majority of the Members of this Court would prefer, that is not the ordering of priorities under the Constitution forged by the Framers, and this Court's sworn duty is to uphold that Constitu-

[16] The Court also notes that "attention . . . [is] diverted" when trial courts address exclusionary rule issues, *ante*, at 490, and with the result that application of the rule "often frees the guilty." *Ibid.* Of course, these "arguments" are true with respect to every constitutional guarantee governing administration of the criminal justice system.

tion and not to frame its own. The procedural safeguards mandated in the Framers' Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the "guilty" are punished and the "innocent" freed; rather, every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty. Particular constitutional rights that do not affect the fairness of factfinding procedures cannot for that reason be denied at the trial itself. What possible justification then can there be for denying vindication of such rights on federal habeas when state courts do deny those rights at trial? To sanction disrespect and disregard for the Constitution in the name of protecting society from lawbreakers is to make the government itself lawless and to subvert those values upon which our ultimate freedom and liberty depend.[17] "The history of American freedom

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[17] "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States*, 277 U. S. 438, 479 (1928) (Brandeis, J., dissenting). See also *id.*, at 483, 485.

"We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness." *Miller* v. *United States*, 357 U. S. 301, 313 (1958). See also *Boyd* v. *United States*, 116 U. S.

is, in no small measure, the history of procedure," *Malinski* v. *New York,* 324 U. S. 401, 414 (1945) (opinion of Frankfurter, J.), and as Mr. Justice Holmes so succinctly reminded us, it is "a less evil that some criminals should escape than that the Government should play an ignoble part." *Olmstead* v. *United States,* 277 U. S. 438, 470 (1928) (dissenting opinion). "[I]t is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy." *Brown* v. *Allen,* 344 U. S., at 498 (opinion of Frankfurter, J.). Enforcement of *federal* constitutional rights that redress constitutional violations directed against the "guilty" is a particular function of *federal* habeas review, lest judges trying the "morally unworthy" be tempted not to execute the supreme law of the land. State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences, and the federal habeas statutes reflect the congressional judgment that such detached federal review is a salutary safeguard against *any* detention of an individual "in violation of the Constitution or laws . . . of the United States."

Federal courts have the duty to carry out the congres-

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616, 635 (1886); *Weeks* v. *United States,* 232 U. S. 383, 392–394 (1914).

The Court asserts that "the hyperbole of the dissenting opinion is misdirected," *ante,* at 495 n. 37, but I take seriously this Court's continuing incursions on constitutionally guaranteed rights. "[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *United States, supra,* at 635.

sionally assigned responsibility to shoulder the ultimate burden of adjudging whether detentions violate federal law, and today's decision substantially abnegates that duty. The Court does not, because it cannot, dispute that institutional constraints totally preclude any possibility that this Court can adequately oversee whether state courts have properly applied federal law,[18] and does not controvert the fact that federal habeas jurisdiction is partially designed to ameliorate that inadequacy. Thus, although I fully agree that state courts "have a constitutional obligation to safeguard personal liberties and to uphold federal law," and that there is no "general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States," *ante*, at 494 n. 35, I cannot agree that it follows that, as the Court today holds, federal-court determination of almost all Fourth Amendment claims of state prisoners should be barred and that state-court resolution of those issues should be insulated from the federal review Congress intended. For, as Mr. Justice Frankfurter so aptly framed the issue in rejecting similar contentions in construing the habeas statutes in *Brown* v. *Allen*, *supra:*

> "Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution. . . . It is not for us to determine whether this power should have been vested in the federal courts. . . . [*T*]*he wisdom of such a modification in the law is for Congress to*

[18] These considerations were powerfully articulated in *Brown* v. *Allen*, 344 U. S. 443, 491–494 (1953) (opinion of Frankfurter, J.). Cf. also *Fay* v. *Noia*, 372 U. S., at 432–433; *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 415–417 (1964).

*consider,* particularly in view of the effect of the expanding concept of due process upon enforcement by the States of their criminal laws. *It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims.* . . .

". . . But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have." 344 U. S., at 499–500 (emphasis supplied).

"State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide." *Id.,* at 506.

"Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus. . . . But it would be in disregard of what Congress has expressly required to deny State prisoners access to the federal courts.

". . . Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. *It is merely one aspect of respecting the Supremacy Clause of the*

> *Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law.* The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted." 344 U. S., at 508–510 (emphasis supplied).

Congress' action following *Townsend* v. *Sain*, 372 U. S. 293 (1963), and *Fay* v. *Noia*, 372 U. S. 391 (1963), emphasized "the choice of Congress how the superior authority of federal law should be asserted" in federal courts. *Townsend* v. *Sain* outlined the duty of federal habeas courts to conduct factfinding hearings with respect to petitions brought by state prisoners, and *Fay* v. *Noia* defined the contours of the "exhaustion of state remedies" prerequisite in § 2254 in light of its purpose of according state courts the first opportunity to correct their own constitutional errors. Congress expressly modified the habeas statutes to incorporate the *Townsend* standards so as to accord a limited and carefully circumscribed res judicata effect to the factual determinations of state judges. But Congress did not alter the principle of *Brown*, *Fay*, and *Kaufman* that collateral relief is to be available with respect to *any* constitutional deprivation and that federal district judges, subject to review in the courts of appeals and this Court, are to be the spokesmen of the supremacy of federal law. Indeed, subsequent congressional efforts to amend those jurisdictional statutes to effectuate the result that my Brethren accomplish by judicial fiat have

consistently proved unsuccessful. There remains, as noted before, no basis whatsoever in the language or legislative history of the habeas statutes for establishing such a hierarchy of federal rights; certainly there is no constitutional warrant in this Court to override a congressional determination respecting federal-court review of decisions of state judges determining constitutional claims of state prisoners.

In any event, respondents' contention that Fourth Amendment claims, like all other constitutional claims, must be cognizable on habeas, does not rest on the ground attributed to them by the Court—that the state courts are rife with animosity to the constitutional mandates of this Court. It is one thing to assert that state courts, as a general matter, accurately decide federal constitutional claims; it is quite another to generalize from that limited proposition to the conclusion that, despite congressional intent that federal courts sitting in habeas must stand ready to rectify any constitutional errors that are nevertheless committed, federal courts are to be judicially precluded from ever considering the merits of whole categories of rights that are to be accorded less procedural protection merely because the Court proclaims that they do not affect the accuracy or fairness of the factfinding process. "Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction." *Brown* v. *Allen*, 344 U. S., at 498–499 (opinion of Frankfurter, J.). To the extent state trial and appellate judges faithfully, accurately, and assiduously apply federal law and the constitutional principles enunciated by the federal

courts, such determinations will be vindicated on the merits when collaterally attacked. But to the extent federal law is erroneously applied by the state courts, there is no authority in this Court to deny defendants the right to have those errors rectified by way of federal habeas; [19] indeed, the Court's reluctance to accept Congress' desires along these lines can only be a manifestation of this Court's mistrust for *federal* judges. Furthermore, some might be expected to dispute the academic's dictum seemingly accepted by the Court that a federal judge is not necessarily more skilled than a state judge in applying federal law. See *ante*, at 494 n. 35. For the Supremacy Clause of the Constitution proceeds on a different premise, and Congress, as it was constitutionally empowered to do, made federal judges (and initially federal district court judges) "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Zwickler* v. *Koota*, 389 U. S. 241, 247 (1967).

If proof of the necessity of the federal habeas jurisdiction were required, the disposition by the state courts of the underlying Fourth Amendment issues presented by these cases supplies it. In No. 74–1055, respondent was arrested pursuant to a statute which obviously is unconstitutional under *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972). Even apart from its vagueness and concomitant potential for arbitrary and discriminatory enforcement, the statute purports to criminalize the presence of one unable to account for his presence in a situation where a reasonable person might believe that pub-

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[19] See *Brown* v. *Allen*, 344 U. S., at 497–499 (opinion of Frankfurter, J.). "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities." *Id.*, at 498.

lic safety demands identification. See *ante*, at 469 n. 1. It is no crime in a free society not to have "identification papers" on one's person, and the statute is a palpable effort to enable police to arrest individuals on the basis of mere suspicion and to facilitate detention even when there is no probable cause to believe a crime has been or is likely to be committed. See 405 U. S., at 168–170. Without elaborating on the various arguments buttressing this result, including the self-incrimination aspects of the ordinance and its attempt to circumvent Fourth Amendment safeguards in a situation that, under *Terry* v. *Ohio*, 392 U. S. 1 (1968), would at most permit law enforcement officials to conduct a protective search for weapons, I would note only that the ordinance, due to the Court's failure to address its constitutionality today, remains in full force and effect, thereby affirmatively encouraging further Fourth Amendment violations. Moreover, the fact that only a single state judge ever addressed the validity of the ordinance, and the lack of record evidence as to why or how he rejected respondent's claim, gives me pause as to whether there is any real content to the Court's "exception" for bringing Fourth Amendment claims on habeas in situations in which state prisoners were not accorded an opportunity for a full and fair state-court resolution of those claims; that fact also makes irrelevant the Court's presumption that deterrence is not furthered when there is federal habeas review of a search-and-seizure claim that was erroneously rejected by "two or more tiers of state courts." *Ante*, at 491.

Even more violative of constitutional safeguards is the manner in which the Nebraska courts dealt with the merits in respondent Rice's case. Indeed, the manner in which Fourth Amendment principles were applied in the Nebraska Supreme Court is paradigmatic of Congress'

concern respecting attempts by state courts to structure Fourth Amendment jurisprudence so as not to upset convictions of the "guilty" or the "unworthy." As Judge Urbom fully detailed in two thorough and thoughtful opinions in the District Court on Rice's petition for habeas, the affidavit upon which the Omaha police obtained a warrant and thereby searched Rice's apartment was clearly deficient under prevailing constitutional standards, and no extant exception to the warrant requirement justified the search absent a valid warrant. Yet the Nebraska Supreme Court upheld the search on the alternative and patently untenable ground that there is no Fourth Amendment violation if a defective warrant is supplemented *at a suppression hearing* by facts that theoretically could have been, but were not, presented to the issuing magistrate. Such a construction of the Fourth Amendment would obviously abrogate the warrant requirement of the Fourth Amendment and the principle that its "protection consists in requiring that those inferences [as to whether the data available justify an intrusion upon a person's privacy] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 14 (1948). Yet the Court today, by refusing to reaffirm our precedents, see *ante,* at 473 n. 3, even casts some doubt on that heretofore unquestioned precept of Fourth Amendment jurisprudence that "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. See *Aguilar* v. *Texas,* 378 U. S. 108, 109 n. 1. A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Whiteley* v. *Warden,* 401 U. S., at 565

n. 8. Of course, for the Court strongly to reiterate the fundamentality of this principle would only highlight the Nebraska Supreme Court's distortion of the Fourth Amendment in an emotionally charged case, and thereby accentuate the general potential for erroneous state-court adjudication of Fourth Amendment claims.[20]

## III

Other aspects of today's decision are deserving of comment but one particularly merits special attention. For the Court's failure to limit today's ruling to prospective application stands in sharp contrast to recent cases that have so limited decisions expanding or affirming constitutional rights. Respondents, relying on the explicit holding of *Fay* v. *Noia,* 372 U. S. 391 (1963), that a petition for a writ of certiorari is not a necessary predicate for federal habeas relief, and accepting at face value the clear import of our prior habeas cases that all unconstitutional confinements may be challenged on federal habeas, contend that any new restriction on state prisoners' ability to obtain habeas relief should be held to be prospective only. The Court, however, dismisses respondents' effective inability to have a single federal court pass on their federal constitutional claims with the offhand remark that "respondents were, of course, free to file a timely petition for certiorari prior to seeking federal habeas corpus relief." *Ante,* at 495 n. 38. To be sure, the fact that the time limits for invoking our certiorari jurisdiction with respect to criminal cases emanating from state courts are

[20] The Nebraska Supreme Court fell into patent error in citing *Whiteley* for the proposition that "the affidavit may be supplemented by testimony of additional evidence known to the police." *State* v. *Rice,* 188 Neb. 728, 739, 199 N. W. 2d 480, 488 (1972).

*non*-jurisdictional would dictate that respondents are at least free to file out-of-time certiorari petitions; under the Court's "direct review" distinction delineated today, we would still have authority to address the substance of respondents' eminently and concededly meritorious Fourth Amendment claims. Of course, federal review by certiorari in this Court is a matter of grace, and it is grace now seldom bestowed at the behest of a criminal defendant. I have little confidence that three others of the Brethren would join in voting to grant such petitions, thereby reinforcing the notorious fact that our certiorari jurisdiction is inadequate for containing state criminal proceedings within constitutional bounds and underscoring Congress' wisdom in mandating a broad federal habeas jurisdiction for the district courts. In any event, since we are fully familiar with the records in these cases, respondents are owed at least review in this Court, particularly since it shuts the doors of the district courts in a decision that marks such a stark break with our precedents on the scope of habeas relief; indeed, if the Court were at all disposed to safeguard constitutional rights and educate state and federal judges concerning the contours of Fourth Amendment jurisprudence in various situations, it would decide these cases on the merits rather than employ a procedural ruse that ensures respondents' continued unconstitutional confinement.

## IV

In summary, while unlike the Court I consider that the exclusionary rule is a constitutional ingredient of the Fourth Amendment, any modification of that rule should at least be accomplished with some modicum of logic and justification not provided today. See, *e. g.*, Dershowitz & Ely, *Harris* v. *New York:* Some Anxious Observations

on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L. J. 1198 (1971). The Court does not disturb the holding of *Mapp* v. *Ohio* that, as a matter of federal constitutional law, illegally obtained evidence must be excluded from the trial of a criminal defendant whose rights were transgressed during the search that resulted in acquisition of the evidence. In light of that constitutional rule it is a matter for Congress, not this Court, to prescribe what federal courts are to review state prisoners' claims of constitutional error committed by state courts. Until this decision, our cases have never departed from the construction of the habeas statutes as embodying a congressional intent that, however substantive constitutional rights are delineated or expanded, those rights may be asserted as a procedural matter under federal habeas jurisdiction. Employing the transparent tactic that today's is a decision construing the Constitution, the Court usurps the authority—vested by the Constitution in the Congress—to reassign federal judicial responsibility for reviewing state prisoners' claims of failure of state courts to redress violations of their Fourth Amendment rights. Our jurisdiction is eminently unsuited for that task, and as a practical matter the only result of today's holding will be that denials by the state courts of claims by state prisoners of violations of their Fourth Amendment rights will go unreviewed by a federal tribunal. I fear that the same treatment ultimately will be accorded state prisoners' claims of violations of other constitutional rights; thus the potential ramifications of this case for federal habeas jurisdiction generally are ominous. The Court, no longer content just to restrict forthrightly the constitutional rights of the citizenry, has embarked on a campaign to water down even such constitutional rights as it purports to acknowledge

by the device of foreclosing resort to the federal habeas remedy for their redress.

I would affirm the judgments of the Courts of Appeals.

MR. JUSTICE WHITE, dissenting.

For many of the reasons stated by MR. JUSTICE BRENNAN, I cannot agree that the writ of habeas corpus should be any less available to those convicted of state crimes where they allege Fourth Amendment violations than where other constitutional issues are presented to the federal court. Under the amendments to the habeas corpus statute, which were adopted after *Fay* v. *Noia*, 372 U. S. 391 (1963), and represented an effort by Congress to lend a modicum of finality to state criminal judgments, I cannot distinguish between Fourth Amendment and other constitutional issues.

Suppose, for example, that two confederates in crime, Smith and Jones, are tried separately for a state crime and convicted on the very same evidence, including evidence seized incident to their arrest allegedly made without probable cause. Their constitutional claims are fully aired, rejected, and preserved on appeal. Their convictions are affirmed by the State's highest court. Smith, the first to be tried, does not petition for certiorari, or does so but his petition is denied. Jones, whose conviction was considerably later, is more successful. His petition for certiorari is granted and his conviction reversed because this Court, without making any new rule of law, simply concludes that on the undisputed facts the arrests were made without probable cause and the challenged evidence was therefore seized in violation of the Fourth Amendment. The State must either retry Jones or release him, necessarily because he is deemed in custody in violation of the Constitution. It turns out that without the evidence illegally seized, the State has no case;

and Jones goes free. Smith then files his petition for habeas corpus. He makes no claim that he did not have a full and fair hearing in the state courts, but asserts that his Fourth Amendment claim had been erroneously decided and that he is being held in violation of the Federal Constitution. He cites this Court's decision in Jones' case to satisfy any burden placed on him by § 2254 to demonstrate that the state court was in error. Unless the Court's reservation, in its present opinion, of those situations where the defendant has not had a full and fair hearing in the state courts is intended to encompass all those circumstances under which a state criminal judgment may be re-examined under § 2254—in which event the opinion is essentially meaningless and the judgment erroneous—Smith's petition would be dismissed, and he would spend his life in prison while his colleague is a free man. I cannot believe that Congress intended this result.

Under the present habeas corpus statute, neither Rice's nor Powell's application for habeas corpus should be dismissed on the grounds now stated by the Court. I would affirm the judgments of the Courts of Appeals as being acceptable applications of the exclusionary rule applicable in state criminal trials by virtue of *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

I feel constrained to say, however, that I would join four or more other Justices in substantially limiting the reach of the exclusionary rule as presently administered under the Fourth Amendment in federal and state criminal trials.

Whether I would have joined the Court's opinion in *Mapp* v. *Ohio, supra,* had I then been a Member of the Court, I do not know. But as time went on after coming to this bench, I became convinced that both

*Weeks* v. *United States*, 232 U. S. 383 (1914), and *Mapp* v. *Ohio* had overshot their mark insofar as they aimed to deter lawless action by law enforcement personnel and that in many of its applications the exclusionary rule was not advancing that aim in the slightest, and that in this respect it was a senseless obstacle to arriving at the truth in many criminal trials.

The rule has been much criticized and suggestions have been made that it should be wholly abolished, but I would overrule neither *Weeks* v. *United States* nor *Mapp* v. *Ohio*. I am nevertheless of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed.

An officer sworn to uphold the law and to apprehend those who break it inevitably must make judgments regarding probable cause to arrest: Is there reasonable ground to believe that a crime has been committed and that a particular suspect has committed it? Sometimes the historical facts are disputed or are otherwise in doubt. In other situations the facts may be clear so far as they are known, yet the question of probable cause remains. In still others there are special worries about the reliability of secondhand information such as that coming from informants. In any of these situations, which occur repeatedly, when the officer is convinced that he has probable cause to arrest he will very

likely make the arrest. Except in emergencies, it is probable that his colleagues or superiors will participate in the decision, and it may be that the officer will secure a warrant, although warrantless arrests on probable cause are not forbidden by the Constitution or by state law. Making the arrest in such circumstances is precisely what the community expects the police officer to do. Neither officers nor judges issuing arrest warrants need delay apprehension of the suspect until unquestioned proof against him has accumulated. The officer may be shirking his duty if he does so.

In most of these situations, it is hoped that the officer's judgment will be correct; but experience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution. It may also be, as in the *Powell* case now before us, that there is probable cause to make an arrest under a particular criminal statute but when evidence seized incident to the arrest is offered in support of still another criminal charge, the statute under which the arrest and seizure were made is declared unconstitutional and the evidence ruled inadmissible under the exclusionary rule as presently administered.

In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a

reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty. It is true that in such cases the courts have ultimately determined that in their view the officer was mistaken; but it is also true that in making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest.

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.

Admitting the evidence in such circumstances does not render judges participants in Fourth Amendment violations. The violation, if there was one, has already occurred and the evidence is at hand. Furthermore, there has been only mistaken, but unintentional and faultless, conduct by enforcement officers. Exclusion of the evidence does not cure the invasion of the defendant's rights which he has already suffered. Where an arrest has been made on probable cause but the defendant is acquitted, under federal law the defendant has no right to damages simply because his innocence has been

proved. "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson* v. *Ray,* 386 U. S. 547, 555 (1967). The officer is also excused from liability for "acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." *Ibid.* There is little doubt that as far as civil liability is concerned, the rule is the same under federal law where the officer mistakenly but reasonably believes he has probable cause for an arrest. In *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), the Court announced generally that officers of the executive branch of the government should be immune from liability where their action is reasonable "in light of all the circumstances, coupled with good-faith belief." *Id.,* at 247–248. The Court went on to say:

> "Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.,* at 241–242 (footnote omitted).

The Court has proceeded on this same basis in other contexts. *O'Connor* v. *Donaldson,* 422 U. S. 563 (1975); *Wood* v. *Strickland,* 420 U. S. 308 (1975).

If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy, it

makes even less sense to exclude the evidence solely on his behalf. He is not at all recompensed for the invasion by merely getting his property back. It is often contraband and stolen property to which he is not entitled in any event. He has been charged with crime and is seeking to have probative evidence against him excluded, although often it is the instrumentality of the crime. There is very little equity in the defendant's side in these circumstances. The exclusionary rule, a judicial construct, seriously shortchanges the public interest as presently applied. I would modify it accordingly.

Syllabus

## UNITED STATES *v.* MARTINEZ-FUERTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–1560. Argued April 26, 1976—Decided July 6, 1976*

1. The Border Patrol's routine stopping of a vehicle at a permanent checkpoint located on a major highway away from the Mexican border for brief questioning of the vehicle's occupants is consistent with the Fourth Amendment, and the stops and questioning may be made at reasonably located checkpoints in the absence of any individualized suspicion that the particular vehicle contains illegal aliens. Pp. 556–564.

(a) To require that such stops always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car necessary to identify it as a possible carrier of illegal aliens. Such a requirement also would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly. Pp. 556–557.

(b) While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited, the interference with legitimate traffic being minimal and checkpoint operations involving less discretionary enforcement activity than roving-patrol stops. Pp. 557–560.

(c) Under the circumstances of these checkpoint stops, which do not involve searches, the Government or public interest in making such stops outweighs the constitutionally protected interest of the private citizen. Pp. 560–562.

(d) With respect to the checkpoint involved in No. 74–1560, it is constitutional to refer motorists selectively to a secondary inspection area for limited inquiry on the basis of criteria that would not sustain a roving-patrol stop, since the intrusion is sufficiently minimal that no particularized reason need exist to justify it. Pp. 563–564.

2. Operation of a fixed checkpoint need not be authorized in advance by a judicial warrant. *Camara* v. *Municipal Court*, 387

*Together with No. 75–5387, *Sifuentes* v. *United States*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

U. S. 523, distinguished. The visible manifestations of the field officers' authority at a checkpoint provide assurances to motorists that the officers are acting lawfully. Moreover, the purpose of a warrant in preventing hindsight from coloring the evaluation of the reasonableness of a search or seizure is inapplicable here, since the reasonableness of checkpoint stops turns on factors such as the checkpoint's location and method of operation. These factors are not susceptible of the distortion of hindsight, and will be open to post-stop review notwithstanding the absence of a warrant. Nor is the purpose of a warrant in substituting a magistrate's judgment for that of the searching or seizing officer applicable, since the need for this is reduced when the decision to "seize" is not entirely in the hands of the field officer and deference is to be given to the administrative decisions of higher ranking officials in selecting the checkpoint locations. Pp. 564–566.

No. 74–1560, 514 F. 2d 308, reversed and remanded; No. 75–5387, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 567.

*Mark L. Evans* argued the cause for the United States in both cases. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Thornburgh,* and *Sidney M. Glazer.*

*Ballard Bennett,* by appointment of the Court, 423 U. S. 1030, argued the cause and filed briefs for petitioner in No. 75–5387.

*Charles M. Sevilla,* by appointment of the Court, 423 U. S. 922, argued the cause for respondents in No. 74–1560. With him on the brief was *Michael J. McCabe.*†

†*Melvin L. Wulf, Joel M. Gora, Vilma S. Martinez, Sanford J. Rosen,* and *Jerome B. Falk, Jr.,* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance in No. 74–1560.

MR. JUSTICE POWELL delivered the opinion of the Court.

These cases involve criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens. Each defendant was arrested at a permanent checkpoint operated by the Border Patrol away from the international border with Mexico, and each sought the exclusion of certain evidence on the ground that the operation of the checkpoint was incompatible with the Fourth Amendment. In each instance whether the Fourth Amendment was violated turns primarily on whether a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens. We reserved this question last Term in *United States* v. *Ortiz*, 422 U. S. 891, 897 n. 3 (1975). We hold today that such stops are consistent with the Fourth Amendment. We also hold that the operation of a fixed checkpoint need not be authorized in advance by a judicial warrant.

## I

### A

The respondents in No. 74–1560 are defendants in three separate prosecutions resulting from arrests made on three different occasions at the permanent immigration checkpoint on Interstate 5 near San Clemente, Cal. Interstate 5 is the principal highway between San Diego and Los Angeles, and the San Clemente checkpoint is 66 road miles north of the Mexican border. We previously have described the checkpoint as follows:

> " 'Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating "ALL VEHICLES, STOP AHEAD, 1 MILE." Three-quarters of a

> mile further north are two black on yellow signs suspended over the highway with flashing lights stating "WATCH FOR BRAKE LIGHTS." At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state "STOP HERE—U. S. OFFICERS." Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red "STOP" sign checks traffic. Blocking traffic in the unused lanes are official U. S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation.'" *United States* v. *Ortiz, supra,* at 893, quoting *United States* v. *Baca,* 368 F. Supp. 398, 410–411 (SD Cal. 1973).

The "point" agent standing between the two lanes of traffic visually screens all northbound vehicles, which the checkpoint brings to a virtual, if not a complete, halt.[1] Most motorists are allowed to resume their progress without any oral inquiry or close visual examination. In a relatively small number of cases the "point" agent will conclude that further inquiry is in order. He directs these cars to a secondary inspection area, where their occupants are asked about their citizenship and immigration status. The Government informs us that at San

[1] The parties disagree as to whether vehicles not referred to the secondary inspection area are brought to a complete halt or merely "roll" slowly through the checkpoint. Resolution of this dispute is not necessary here, as we may assume, *arguendo,* that all motorists passing through the checkpoint are so slowed as to have been "seized."

Clemente the average length of an investigation in the secondary inspection area is three to five minutes. Brief for United States 53. A direction to stop in the secondary inspection area could be based on something suspicious about a particular car passing through the checkpoint, but the Government concedes that none of the three stops at issue in No. 74–1560 was based on any articulable suspicion. During the period when these stops were made, the checkpoint was operating under a magistrate's "warrant of inspection," which authorized the Border Patrol to conduct a routine-stop operation at the San Clemente location.[2]

We turn now to the particulars of the stops involved in No. 74–1560, and the procedural history of the case. Respondent Amado Martinez-Fuerte approached the checkpoint driving a vehicle containing two female passengers. The women were illegal Mexican aliens who had entered the United States at the San Ysidro port of entry by using false papers and rendezvoused with Martinez-Fuerte in San Diego to be transported northward. At the checkpoint their car was directed to the secondary inspection area. Martinez-Fuerte produced documents showing him to be a lawful resident alien, but his passengers admitted being present in the country unlawfully. He was charged, *inter alia,* with two counts of illegally transporting aliens in violation

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[2] The record does not reveal explicitly why a warrant was sought. Shortly before the warrant application, however, the Court of Appeals for the Ninth Circuit had held unconstitutional a routine stop and search conducted at a permanent checkpoint without such a warrant. See *United States* v. *Bowen,* 500 F. 2d 960 (1974), aff'd on other grounds, 422 U. S. 916 (1975); *United States* v. *Juarez-Rodriguez,* 498 F. 2d 7 (1974). Soon after the warrant issued, the Court of Appeals also held unconstitutional routine checkpoint stops conducted without a warrant. See *United States* v. *Esquer-Rivera,* 500 F. 2d 313 (1974). See also n. 15, *infra.*

of 8 U. S. C. § 1324 (a)(2). He moved before trial to suppress all evidence stemming from the stop on the ground that the operation of the checkpoint was in violation of the Fourth Amendment.[3] The motion to suppress was denied, and he was convicted on both counts after a jury trial.

Respondent Jose Jiminez-Garcia attempted to pass through the checkpoint while driving a car containing one passenger. He had picked the passenger up by prearrangement in San Ysidro after the latter had been smuggled across the border. Questioning at the secondary inspection area revealed the illegal status of the passenger, and Jiminez-Garcia was charged in two counts with illegally transporting an alien, 8 U. S. C. § 1324 (a)(2), and conspiring to commit that offense, 18 U. S. C. § 371. His motion to suppress the evidence derived from the stop was granted.

Respondents Raymond Guillen and Fernando Medrano-Barragan approached the checkpoint with Guillen driving and Medrano-Barragan and his wife as passengers. Questioning at the secondary inspection area revealed that Medrano-Barragan and his wife were illegal aliens. A subsequent search of the car uncovered three other illegal aliens in the trunk. Medrano-Barragan had led the other aliens across the border at the beach near Tijuana, Mexico, where they rendezvoused with Guillen, a United States citizen. Guillen and Medrano-Barragan were jointly indicted on four counts of illegally trans-

[3] Each of the defendants in No. 74–1560 and the defendant in No. 75–5387 sought to suppress, among other things, the testimony of one or more illegal aliens. We noted in *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 876 n. 2 (1975), that "[t]here may be room to question whether voluntary testimony of a witness at trial, as opposed to a Government agent's testimony about objects seized or statements overheard, is subject to suppression . . . ." The question again is not before us.

porting aliens, 8 U. S. C. § 1324 (a)(2), four counts of inducing the illegal entry of aliens, § 1324 (a)(4), and one conspiracy count, 18 U. S. C. § 371. The District Court granted the defendants' motion to suppress.

Martinez-Fuerte appealed his conviction, and the Government appealed the granting of the motions to suppress in the respective prosecutions of Jiminez-Garcia and of Guillen and Medrano-Barragan.[4] The Court of Appeals for the Ninth Circuit consolidated the three appeals, which presented the common question whether routine stops and interrogations at checkpoints are consistent with the Fourth Amendment.[5] The Court of Appeals held, with one judge dissenting, that these stops violated the Fourth Amendment, concluding that a stop for inquiry is constitutional only if the Border Patrol reasonably suspects the presence of illegal aliens on the basis of articulable facts. It reversed Martinez-Fuerte's conviction, and affirmed the orders to suppress in the other cases. 514 F. 2d 308 (1975). We reverse and remand.

B

Petitioner in No. 75–5387, Rodolfo Sifuentes, was arrested at the permanent immigration checkpoint on U. S. Highway 77 near Sarita, Tex. Highway 77 originates in Brownsville, and it is one of the two major highways running north from the lower Rio Grande valley. The Sarita checkpoint is about 90 miles north of Browns-

[4] The prosecution of Martinez-Fuerte was before a different District Judge than were the other cases.

[5] The principal question before the Court of Appeals was the constitutional significance of the "warrant of inspection" under which the checkpoint was operating when the defendants were stopped. See n. 15, *infra*. The Government, however, preserved the question whether routine checkpoint stops could be made absent a warrant.

ville, and 65–90 miles from the nearest points of the Mexican border. The physical arrangement of the checkpoint resembles generally that at San Clemente, but the checkpoint is operated differently in that the officers customarily stop all northbound motorists for a brief inquiry. Motorists whom the officers recognize as local inhabitants, however, are waved through the checkpoint without inquiry. Unlike the San Clemente checkpoint the Sarita operation was conducted without a judicial warrant.

Sifuentes drove up to the checkpoint without any visible passengers. When an agent approached the vehicle, however, he observed four passengers, one in the front seat and the other three in the rear, slumped down in the seats. Questioning revealed that each passenger was an illegal alien, although Sifuentes was a United States citizen. The aliens had met Sifuentes in the United States, by prearrangement, after swimming across the Rio Grande.

Sifuentes was indicted on four counts of illegally transporting aliens. 8 U. S. C. § 1324 (a)(2). He moved on Fourth Amendment grounds to suppress the evidence derived from the stop. The motion was denied and he was convicted after a jury trial. Sifuentes renewed his Fourth Amendment argument on appeal, contending primarily that stops made without reason to believe a car is transporting aliens illegally are unconstitutional. The United States Court of Appeals for the Fifth Circuit affirmed the conviction, 517 F. 2d 1402 (1975), relying on its opinion in *United States* v. *Santibanez*, 517 F. 2d 922 (1975). There the Court of Appeals had ruled that routine checkpoint stops are consistent with the Fourth Amendment. We affirm.[6]

[6] We initially granted the Government's petition for a writ of certiorari in No. 74–1560, 423 U. S. 822, and later granted Sifuentes'

## II

The Courts of Appeals for the Ninth and the Fifth Circuits are in conflict on the constitutionality of a law enforcement technique considered important by those charged with policing the Nation's borders. Before turning to the constitutional question, we examine the context in which it arises.

### A

It has been national policy for many years to limit immigration into the United States. Since July 1, 1968, the annual quota for immigrants from all independent countries of the Western Hemisphere, including Mexico, has been 120,000 persons. Act of Oct. 3, 1965, § 21 (e), 79 Stat. 921. Many more aliens than can be accommodated under the quota want to live and work in the United States. Consequently, large numbers of aliens seek illegally to enter or to remain in the United States. We noted last Term that "[e]stimates of the number of illegal immigrants [already] in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975) (footnote omitted). It is estimated that 85% of the illegal immigrants are from Mexico, drawn by the fact that economic opportunities are significantly greater in the United States than they are in Mexico. *United States* v. *Baca*, 368 F. Supp., at 402.

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petition in No. 75-5387 and directed that the cases be argued in tandem. 423 U. S. 945. Subsequently we granted the motion of the Solicitor General to consolidate the cases for oral argument. 425 U. S. 931.

Interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems. The principal problem arises from surreptitious entries. *Id.*, at 405. The United States shares a border with Mexico that is almost 2,000 miles long, and much of the border area is uninhabited desert or thinly populated arid land. Although the Border Patrol maintains personnel, electronic equipment, and fences along portions of the border, it remains relatively easy for individuals to enter the United States without detection. It also is possible for an alien to enter unlawfully at a port of entry by the use of falsified papers or to enter lawfully but violate restrictions of entry in an effort to remain in the country unlawfully.[7] Once within the country, the aliens seek to travel inland to areas where employment is believed to be available, frequently meeting by prearrangement with friends or professional smugglers who transport them in private vehicles. *United States* v. *Brignoni-Ponce, supra,* at 879.

The Border Patrol conducts three kinds of inland traffic-checking operations in an effort to minimize illegal immigration. Permanent checkpoints, such as those at San Clemente and Sarita, are maintained at or near intersections of important roads leading away from the border. They operate on a coordinated basis designed to avoid circumvention by smugglers and others who transport the illegal aliens. Temporary checkpoints, which operate like permanent ones, occasionally are established in other strategic locations. Finally, roving patrols are maintained to supplement the checkpoint system. See *Almeida-Sanchez* v. *United*

[7] The latter occurs particularly where "border passes" are issued to simplify passage between interrelated American and Mexican communities along the border. These passes authorize travel within 25 miles of the border for a 72-hour period. See 8 CFR § 212.6 (1976).

*States,* 413 U. S. 266, 268 (1973).[8] In fiscal 1973, 175,511 deportable aliens were apprehended throughout the Nation by "line watch" agents stationed at the border itself. Traffic-checking operations in the interior apprehended approximately 55,300 more deportable aliens.[9] Most of the traffic-checking apprehensions were at checkpoints, though precise figures are not available. *United States* v. *Baca, supra,* at 405, 407, and n. 2.

B

We are concerned here with permanent checkpoints, the locations of which are chosen on the basis of a number of factors. The Border Patrol believes that to assure effectiveness, a checkpoint must be (i) distant enough from the border to avoid interference with traffic in populated areas near the border, (ii) close to the confluence of two or more significant roads leading away from the border, (iii) situated in terrain that restricts vehicle passage around the checkpoint, (iv) on a stretch of highway compatible with safe operation, and (v) beyond the 25-mile zone in which "border passes," see n. 7, *supra,* are valid. *United States* v. *Baca, supra,* at 406.

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[8] All these operations are conducted pursuant to statutory authorizations empowering Border Patrol agents to interrogate those believed to be aliens as to their right to be in the United States and to inspect vehicles for aliens. 8 U. S. C. §§ 1357 (a)(1), (a)(3). Under current regulations the authority conferred by § 1357 (a)(3) may be exercised anywhere within 100 air miles of the border. 8 CFR § 287.1 (a) (1976).

[9] As used in these statistics, the term "deportable alien" means "a person who has been found to be deportable by an immigration judge, or who admits his deportability upon questioning by official agents." *United States* v. *Baca,* 368 F. Supp. 398, 404 (SD Cal. 1973). Most illegal aliens are simply deported without prosecution. The Government routinely prosecutes persons thought to be smugglers, many of whom are lawfully in the United States.

The record in No. 74–1560 provides a rather complete picture of the effectiveness of the San Clemente checkpoint. Approximately 10 million cars pass the checkpoint location each year, although the checkpoint actually is in operation only about 70% of the time.[10] In calendar year 1973, approximately 17,000 illegal aliens were apprehended there. During an eight-day period in 1974 that included the arrests involved in No. 74–1560, roughly 146,000 vehicles passed through the checkpoint during 124½ hours of operation. Of these, 820 vehicles were referred to the secondary inspection area, where Border Patrol agents found 725 deportable aliens in 171 vehicles. In all but two cases, the aliens were discovered without a conventional search of the vehicle. A similar rate of apprehensions throughout the year would have resulted in an annual total of over 33,000, although the Government contends that many illegal aliens pass through the checkpoint undetected. The record in No. 75–5387 does not provide comparable statistical information regarding the Sarita checkpoint. While it appears that fewer illegal aliens are apprehended there, it may be assumed that fewer pass by undetected, as every motorist is questioned.

## III

The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. See *United States* v. *Brignoni-Ponce*, 422 U. S., at 878; *United States* v. *Ortiz*, 422 U. S., at 895; *Camara* v. *Municipal Court*,

[10] The Sarita checkpoint is operated a comparable proportion of the time. "Down" periods are caused by personnel shortages, weather conditions, and—at San Clemente—peak traffic loads.

387 U. S. 523, 528 (1967). In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual, *United States* v. *Brignoni-Ponce, supra,* at 878; *Terry* v. *Ohio,* 392 U. S. 1, 20–21 (1968), a process evident in our previous cases dealing with Border Patrol traffic-checking operations.

In *Almeida-Sanchez* v. *United States, supra,* the question was whether a roving-patrol unit constitutionally could search a vehicle for illegal aliens simply because it was in the general vicinity of the border. We recognized that important law enforcement interests were at stake but held that searches by roving patrols impinged so significantly on Fourth Amendment privacy interests that a search could be conducted without consent only if there was probable cause to believe that a car contained illegal aliens, at least in the absence of a judicial warrant authorizing random searches by roving patrols in a given area. Compare 413 U. S., at 273, with *id.,* at 283–285 (POWELL, J., concurring), and *id.,* at 288 (WHITE, J., dissenting). We held in *United States* v. *Ortiz, supra,* that the same limitations applied to vehicle searches conducted at a permanent checkpoint.

In *United States* v. *Brignoni-Ponce, supra,* however, we recognized that other traffic-checking practices involve a different balance of public and private interests and appropriately are subject to less stringent constitutional safeguards. The question was under what circumstances a roving patrol could stop motorists in the general area of the border for brief inquiry into their residence status. We found that the interference with Fourth Amendment interests involved in such a stop was "modest," 422 U. S., at 880, while the inquiry served significant law enforcement needs. We therefore held that a roving-patrol stop need not be justified by probable

cause and may be undertaken if the stopping officer is "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that a vehicle contains illegal aliens. *Id.*, at 884.[11]

## IV

It is agreed that checkpoint stops are "seizures" within the meaning of the Fourth Amendment. The defendants contend primarily that the routine stopping of vehicles at a checkpoint is invalid because *Brignoni-Ponce* must be read as proscribing any stops in the absence of reasonable suspicion. Sifuentes alternatively contends in No. 75–5387 that routine checkpoint stops are permissible only when the practice has the advance judicial authorization of a warrant. There was a warrant authorizing the stops at San Clemente but none at Sarita. As we reach the issue of a warrant requirement only if reasonable suspicion is not required, we turn first to whether reasonable suspicion is a prerequisite to a valid stop, a question to be resolved by balancing the interests at stake.

### A

Our previous cases have recognized that maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border. We note here only the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints, a practice which the Government identifies as the most important of the traffic-checking operations. Brief for United States in No. 74–1560, pp. 19–20.[12] These checkpoints

[11] On the facts of the case, we concluded that the stop was impermissible because reasonable suspicion was lacking.

[12] The defendants argue at length that the public interest in maintaining checkpoints is less than is asserted by the Govern-

are located on important highways; in their absence such highways would offer illegal aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and illegal aliens who succumb to the lure of such highways. And the prospect of such inquiries forces others onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols. Cf. *United States* v. *Brignoni-Ponce,* 422 U. S., at 883–885.

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.

B

While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited. The stop does intrude to a limited extent on motorists' right to "free passage with-

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ment because the flow of illegal immigrants could be reduced by means other than checkpoint operations. As one alternative they suggest legislation prohibiting the knowing employment of illegal aliens. The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers. In any event, these arguments tend to go to the general proposition that all traffic-checking procedures are impermissible, a premise our previous cases reject. The defendants do not suggest persuasively that the particular law enforcement needs served by checkpoints could be met without reliance on routine checkpoint stops. Compare *United States* v. *Brignoni-Ponce,* 422 U. S., at 883 (effectiveness of roving patrols not defeated by reasonable suspicion requirement), with *infra,* this page.

out interruption," *Carroll* v. *United States,* 267 U. S. 132, 154 (1925), and arguably on their right to personal security. But it involves only a brief detention of travelers during which

> " '[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.' " *United States* v. *Brignoni-Ponce, supra,* at 880.

Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. This objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop. In *Ortiz,* we noted:

> "[T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." 422 U. S., at 894–895.

In *Brignoni-Ponce,* we recognized that Fourth Amendment analysis in this context also must take into account the overall degree of interference with legitimate traffic. 422 U. S., at 882–883. We concluded there that random roving-patrol stops could not be tolerated because they "would subject the residents of . . . [border] areas to

potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. . . . [They] could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road . . . ." *Ibid.* There also was a grave danger that such unreviewable discretion would be abused by some officers in the field. *Ibid.*

Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.[13]

[13] The choice of checkpoint locations must be left largely to the discretion of Border Patrol officials, to be exercised in accordance

The defendants arrested at the San Clemente checkpoint suggest that its operation involves a significant extra element of intrusiveness in that only a small percentage of cars are referred to the secondary inspection area, thereby "stigmatizing" those diverted and reducing the assurances provided by equal treatment of all motorists. We think defendants overstate the consequences. Referrals are made for the sole purpose of conducting a routine and limited inquiry into residence status that cannot feasibly be made of every motorist where the traffic is heavy. The objective intrusion of the stop and inquiry thus remains minimal. Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature. Moreover, selective referrals—rather than questioning the occupants of every car—tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public.

C

The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.[14] See *Terry* v. *Ohio*, 392

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with statutes and regulations that may be applicable. See n. 15, *infra*. Many incidents of checkpoint operation also must be committed to the discretion of such officials. But see *infra*, at 565–566.

[14] Stops for questioning, not dissimilar to those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendants' position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As

U. S., at 21, and n. 18. But the Fourth Amendment imposes no irreducible requirement of such suspicion. This is clear from *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). See also *Almeida-Sanchez* v. *United States*, 413 U. S., at 283–285 (POWELL, J., concurring); *id.*, at 288 (WHITE, J., dissenting); *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970); *United States* v. *Biswell*, 406 U. S. 311 (1972); *Carroll* v. *United States*, 267 U. S., at 154. In *Camara* the Court required an "area" warrant to support the reasonableness of inspecting private residences within a particular area for building code violations, but recognized that "specific knowledge of the condition of the particular dwelling" was not required to enter any given residence. 387 U. S., at 538. In so holding, the Court examined the government interests advanced to justify such routine intrusions "upon the constitutionally protected interests of the private citizen," *id.*, at 534–535, and concluded that under the circumstances the government interests outweighed those of the private citizen.

We think the same conclusion is appropriate here, where we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. See, *e. g.*, *McDonald* v. *United States*, 335 U. S. 451 (1948). As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. *United States* v. *Ortiz*, 422 U. S., at 896 n. 2; see *Cardwell* v. *Lewis*, 417 U. S. 583, 590–591 (1974) (plurality

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such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use.

opinion). And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.[15]

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[15] As a judicial warrant authorized the Border Patrol to make routine stops at the San Clemente checkpoint, the principal question addressed by the Court of Appeals for the Ninth Circuit in No. 74–1560 was whether routine checkpoint stops were constitutional when authorized by warrant. Cf. n. 5, *supra*. The Court of Appeals held alternatively that a warrant never could authorize such stops, 514 F. 2d 308, 318 (1975), and that it was unreasonable to issue a warrant authorizing routine stops at the San Clemente location. *Id.*, at 321–322. In reaching the latter conclusion, the Court of Appeals relied on (i) "the [low] frequency with which illegal aliens pass through the San Clemente checkpoint," (ii) the distance of the checkpoint from the border, and (iii) the interference with legitimate traffic. *Ibid.* We need not address these holdings specifically, as we conclude that no warrant is needed. But we deem the argument by the defendants in No. 74–1560 in support of the latter holding to raise the question whether, even though a warrant is not required, it is unreasonable to locate a checkpoint at San Clemente.

We answer this question in the negative. As indicated above, the choice of checkpoint locations is an administrative decision that must be left largely within the discretion of the Border Patrol, see n. 13, *supra;* cf. *Camara* v. *Municipal Court,* 387 U. S. 523, 538 (1967). We think the decision to locate a checkpoint at San Clemente was reasonable. The location meets the criteria prescribed by the Border Patrol to assure effectiveness, see *supra,* at 553, and the evidence supports the view that the needs of law enforcement are furthered by this location. The absolute number of apprehensions at the checkpoint is high, see *supra,* at 554, confirming Border Patrol judgment that significant numbers of illegal aliens

We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry,[16] we perceive no constitutional violation. Cf. *United States* v. *Brignoni-Ponce*, 422 U. S., at 885–887. As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol

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regularly use Interstate 5 at this point. Also, San Clemente was selected as the location where traffic is lightest between San Diego and Los Angeles, thereby minimizing interference with legitimate traffic.

No question has been raised about the reasonableness of the location of the Sarita checkpoint.

[16] The Government suggests that trained Border Patrol agents rely on factors in addition to apparent Mexican ancestry when selectively diverting motorists. Brief for United States in No. 75–5387, p. 9; see *United States* v. *Brignoni-Ponce*, 422 U. S., at 884–885. This assertion finds support in the record. Less than 1% of the motorists passing the checkpoint are stopped for questioning, whereas American citizens of Mexican ancestry and legally resident Mexican citizens constitute a significantly larger proportion of the population of southern California. The 1970 census figures, which may not fully reflect illegal aliens, show the population of California to be approximately 19,958,000 of whom some 3,102,000, or 16%, are Spanish-speaking or of Spanish surname. The equivalent percentages for metropolitan San Diego and Los Angeles are 13% and 18% respectively. U. S. Department of Commerce, 1970 Census of Population, vol. 1, pt. 6, Tables 48, 140. If the statewide population ratio is applied to the approximately 146,000 vehicles passing through the checkpoint during the eight days surrounding the arrests in No. 74–1560, roughly 23,400 would be expected to contain persons of Spanish or Mexican ancestry, yet only 820 were referred to the secondary area. This appears to refute any suggestion that the Border Patrol relies extensively on apparent Mexican ancestry standing alone in referring motorists to the secondary area.

officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.[17]

## V

Sifuentes' alternative argument is that routine stops at a checkpoint are permissible only if a warrant has given judicial authorization to the particular checkpoint location and the practice of routine stops. A warrant requirement in these circumstances draws some support from *Camara*, where the Court held that, absent consent, an "area" warrant was required to make a building code inspection, even though the search could be conducted absent cause to believe that there were violations in the building searched.[18]

We do not think, however, that *Camara* is an apt

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[17] Of the 820 vehicles referred to the secondary inspection area during the eight days surrounding the arrests involved in No. 74–1560, roughly 20% contained illegal aliens. *Supra*, at 554. Thus, to the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint, see n. 16, *supra*, that reliance clearly is relevant to the law enforcement need to be served. Cf. *United States* v. *Brignoni-Ponce*, *supra*, at 886–887, where we noted that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor . . . ," although we held that apparent Mexican ancestry by itself could not create the reasonable suspicion required for a roving-patrol stop. Different considerations would arise if, for example, reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border.

[18] There also is some support for a warrant requirement in the concurring and dissenting opinions in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), which commanded the votes of five Justices. See *id.*, at 283–285 (POWELL, J., concurring); *id.*, at 288 (WHITE, J., dissenting). The burden of these opinions, however, was that an "area" warrant could serve as a substitute for the individualized probable cause to search that otherwise was necessary to sustain roving-patrol searches. As particularized suspicion is not necessary here, the warrant function discussed in *Almeida-Sanchez* is not an issue in these cases.

model. It involved the search of private residences, for which a warrant traditionally has been required. See, *e. g., McDonald* v. *United States,* 335 U. S. 451 (1948). As developed more fully above, the strong Fourth Amendment interests that justify the warrant requirement in that context are absent here. The degree of intrusion upon privacy that may be occasioned by a search of a house hardly can be compared with the minor interference with privacy resulting from the mere stop for questioning as to residence. Moreover, the warrant requirement in *Camara* served specific Fourth Amendment interests to which a warrant requirement here would make little contribution. The Court there said:

> "[W]hen [an] inspector [without a warrant] demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." 387 U. S., at 532.

A warrant provided assurance to the occupant on these scores. We believe that the visible manifestations of the field officers' authority at a checkpoint provide substantially the same assurances in this case.

Other purposes served by the requirement of a warrant also are inapplicable here. One such purpose is to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure. Cf. *United States* v. *Watson,* 423 U. S. 411, 455–456, n. 22 (1976) (MARSHALL, J., dissenting). The reasonableness of checkpoint stops, however, turns on factors such as the location and method of operation of the checkpoint, factors that are not susceptible to the distortion of hindsight, and therefore will be open to post-stop review notwith-

standing the absence of a warrant. Another purpose for a warrant requirement is to substitute the judgment of the magistrate for that of the searching or seizing officer. *United States* v. *United States District Court,* 407 U. S. 297, 316–318 (1972). But the need for this is reduced when the decision to "seize" is not entirely in the hands of the officer in the field, and deference is to be given to the administrative decisions of higher ranking officials.

## VI

In summary, we hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant.[19] The principal protection of Fourth

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[19] MR. JUSTICE BRENNAN's dissenting opinion reflects unwarranted concern in suggesting that today's decision marks a radical new intrusion on citizens' rights: It speaks of the "evisceration of Fourth Amendment protections," and states that the Court "virtually empties the Amendment of its reasonableness requirement." *Post,* at 567, 568. Since 1952, Act of June 27, 1952, 66 Stat. 233, Congress has expressly authorized persons believed to be aliens to be interrogated as to residence, and vehicles "within a reasonable distance" from the border to be searched for aliens. See n. 8, *supra.* The San Clemente checkpoint has been operating at or near its present location throughout the intervening 24 years. Our prior cases have limited significantly the reach of this congressional authorization, requiring probable cause for any vehicle search in the interior and reasonable suspicion for inquiry stops by roving patrols. See *supra,* at 555–556. Our holding today, approving routine stops for brief questioning (a type of stop familiar to all motorists) is confined to permanent checkpoints. We understand, of course, that neither longstanding congressional authorization nor widely prevailing practice justifies a constitutional violation. We do suggest, however, that against this background and in the context of our recent decisions, the rhetoric of the dissent reflects unjustified concern.

The dissenting opinion further warns:

"Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that

Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop. See *Terry* v. *Ohio*, 392 U. S., at 24–27; *United States* v. *Brignoni-Ponce*, 422 U. S., at 881–882. We have held that checkpoint searches are constitutional only if justified by consent or probable cause to search. *United States* v. *Ortiz*, 422 U. S. 891 (1975). And our holding today is limited to the type of stops described in this opinion. "[A]ny further detention . . . must be based on consent or probable cause." *United States* v. *Brignoni-Ponce*, *supra*, at 882. None of the defendants in these cases argues that the stopping officers exceeded these limitations. Consequently, we affirm the judgment of the Court of Appeals for the Fifth Circuit, which had affirmed the conviction of Sifuentes. We reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case with directions to affirm the conviction of Martinez-Fuerte and to remand the other cases to the District Court for further proceedings.

*It is so ordered.*

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Today's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures. Early in the Term, *Texas* v. *White*, 423 U. S. 67 (1975), permitted the warrantless search of an automobile in police custody despite the unreasonableness of the custody

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he travels the fixed checkpoint highways at [his] risk . . . ." *Post*, at 572.

For the reason stated in n. 16, *supra*, this concern is misplaced. Moreover, upon a proper showing, courts would not be powerless to prevent the misuse of checkpoints to harass those of Mexican ancestry.

and opportunity to obtain a warrant. *United States* v. *Watson*, 423 U. S. 411 (1976), held that regardless of whether opportunity exists to obtain a warrant, an arrest in a public place for a previously committed felony never requires a warrant, a result certainly not fairly supported by either history or precedent. See *id.*, at 433 (MARSHALL, J., dissenting). *United States* v. *Santana*, 427 U. S. 38 (1976), went further and approved the warrantless arrest for a felony of a person standing on the front porch of her residence. *United States* v. *Miller*, 425 U. S. 435 (1976), narrowed the Fourth Amendment's protection of privacy by denying the existence of a protectible interest in the compilation of checks, deposit slips, and other records pertaining to an individual's bank account. *Stone* v. *Powell*, *ante*, p. 465, precluded the assertion of Fourth Amendment claims in federal collateral relief proceedings. *United States* v. *Janis*, *ante*, p. 433, held that evidence unconstitutionally seized by a state officer is admissible in a civil proceeding by or against the United States. *South Dakota* v. *Opperman*, *ante*, p. 364, approved sweeping inventory searches of automobiles in police custody irrespective of the particular circumstances of the case. Finally, in *Andresen* v. *Maryland*, 427 U. S. 463 (1976), the Court, in practical effect, weakened the Fourth Amendment prohibition against general warrants.

Consistent with this purpose to debilitate Fourth Amendment protections, the Court's decision today virtually empties the Amendment of its reasonableness requirement by holding that law enforcement officials manning fixed checkpoint stations who make standardless seizures of persons do not violate the Amendment. This holding cannot be squared with this Court's recent decisions in *United States* v. *Ortiz*, 422 U. S. 891 (1975); *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975);

and *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973). I dissent.

While the requisite justification for permitting a search or seizure may vary in certain contexts, compare *Beck* v. *Ohio*, 379 U. S. 89 (1964), with *Terry* v. *Ohio*, 392 U. S. 1 (1968), and *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), even in the exceptional situations permitting intrusions on less than probable cause, it has long been settled that justification must be measured by objective standards. Thus in the seminal decision justifying intrusions on less-than-probable cause, *Terry* v. *Ohio*, *supra*, the Court said:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an *objective standard* . . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." 392 U. S., at 21–22 (emphasis added, footnote omitted).
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> "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." 392 U. S., at 21 n. 18.

*Terry* thus made clear what common sense teaches: Conduct, to be reasonable, must pass muster under objective standards applied to specific facts.

We are told today, however, that motorists without number may be individually stopped, questioned, visu-

ally inspected, and then further detained without even a showing of articulable suspicion, see *ante*, at 547, let alone the heretofore constitutional minimum of reasonable suspicion, a result that permits search and seizure to rest upon "nothing more substantial than inarticulate hunches." This defacement of Fourth Amendment protections is arrived at by a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure. But that method is only a convenient cover for condoning arbitrary official conduct, for the governmental interests relied on as warranting intrusion here are the same as those in *Almeida-Sanchez* and *Ortiz*, which required a showing of probable cause for roving-patrol and fixed checkpoint searches, and *Brignoni-Ponce*, which required at least a showing of reasonable suspicion based on specific articulable facts to justify roving-patrol stops. Absent some difference in the nature of the intrusion, the same minimal requirement should be imposed for checkpoint stops.

The Court assumes, and I certainly agree, that persons stopped at fixed checkpoints, whether or not referred to a secondary detention area, are "seized" within the meaning of the Fourth Amendment. Moreover, since the vehicle and its occupants are subjected to a "visual inspection," the intrusion clearly exceeds mere physical restraint, for officers are able to see more in a stopped vehicle than in vehicles traveling at normal speeds down the highway. As the Court concedes, *ante*, at 558, the checkpoint stop involves essentially the same intrusions as a roving-patrol stop, yet the Court provides no principled basis for distinguishing checkpoint stops.

Certainly that basis is not provided in the Court's reasoning that the subjective intrusion here is appreciably less than in the case of a stop by a roving patrol.

*Brignoni-Ponce* nowhere bases the requirement of reasonable suspicion upon the subjective nature of the intrusion. In any event, the subjective aspects of checkpoint stops, even if different from the subjective aspects of roving-patrol stops, just as much require some principled restraint on law enforcement conduct. The motorist whose conduct has been nothing but innocent—and this is overwhelmingly the case—surely resents his own detention and inspection. And checkpoints, unlike roving stops, detain thousands of motorists, a dragnet-like procedure offensive to the sensibilities of free citizens. Also, the delay occasioned by stopping hundreds of vehicles on a busy highway is particularly irritating.

In addition to overlooking these dimensions of subjective intrusion, the Court, without explanation, also ignores one major source of vexation. In abandoning any requirement of a minimum of reasonable suspicion, or even articulable suspicion, the Court in every practical sense renders meaningless, as applied to checkpoint stops, the *Brignoni-Ponce* holding that "standing alone [Mexican appearance] does not justify stopping all Mexican-Americans to ask if they are aliens." [1] 422

[1] *Brignoni-Ponce*, which involved roving-patrol stops, said:

"[Mexican ancestry] alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." 422 U. S., at 886–887 (footnote omitted).

Today we are told that secondary referrals may be based on criteria that would not sustain a roving-patrol stop, and specifically that such referrals may be based largely on Mexican ancestry. *Ante*, at 563. Even if the difference between *Brignoni-Ponce* and

U. S., at 887. Since the objective is almost entirely the Mexican illegally in the country, checkpoint officials, uninhibited by any objective standards and therefore free to stop any or all motorists without explanation or excuse, wholly on whim, will perforce target motorists of Mexican appearance. The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same "suspicious" physical and grooming characteristics of illegal Mexican aliens.

Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists. To be singled out for referral and to be detained and interrogated must be upsetting to any motorist. One wonders what actual experience supports my Brethren's conclusion that referrals "should not be frightening or offensive because of their public and relatively routine nature." *Ante*, at 560.[2] In point of fact, refer-

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this decision is only a matter of degree, we are not told what justifies the different treatment of Mexican appearance or why greater emphasis is permitted in the less demanding circumstances of a checkpoint. That law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances.

[2] The Court's view that "selective referrals—rather than questioning the occupants of every car—tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public," *ante*, at 560, stands the Fourth Amendment on its head. The starting point of this view is the unannounced assumption that intrusions are generally permissible; hence, any minimization of intrusions serves Fourth Amendment interests. Under the Fourth Amendment, however, the status quo is nonintrusion, for as

rals, viewed in context, are not relatively routine; thousands are otherwise permitted to pass. But for the arbitrarily selected motorists who must suffer the delay and humiliation of detention and interrogation, the experience can obviously be upsetting.[3] And that experience is particularly vexing for the motorist of Mexican ancestry who is selectively referred, knowing that the officers' target is the Mexican alien. That deep resentment will be stirred by a sense of unfair discrimination is not difficult to foresee.[4]

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a general matter, it is unreasonable to subject the average citizen or his property to search or seizure. Thus, minimization of intrusion only lessens the aggravation to Fourth Amendment interests; it certainly does not further those interests.

[3] *United States* v. *Ortiz*, 422 U. S. 891 (1975), expressly recognized that such selectivity is a source of embarrassment: "Nor do checkpoint procedures significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those who are only questioned, may not be reassured by seeing that the Border Patrol searches others cars as well." *Id.*, at 895.

[4] Though today's decision would clearly permit detentions to be based solely on Mexican ancestry, the Court takes comfort in what appears to be the Border Patrol practice of not relying on Mexican ancestry standing alone in referring motorists for secondary detentions. *Ante*, at 563 n. 16. See also *ante*, at 566–567, n. 19. Good faith on the part of law enforcement officials, however, has never sufficed in this tribunal to substitute as a safeguard for personal freedoms or to remit our duty to effectuate constitutional guarantees. Indeed, with particular regard to the Fourth Amendment, *Terry* v. *Ohio*, 392 U. S. 1, 22 (1968), held that "simple '"good faith on the part of the arresting officer is not enough." . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.' *Beck* v. *Ohio*, [379 U. S. 89,] 97 [1964]."

Even if good faith is assumed, the affront to the dignity of American citizens of Mexican ancestry and Mexican aliens lawfully within the country is in no way diminished. The fact still remains that people of Mexican ancestry are targeted for examination at

In short, if a balancing process is required, the balance should be struck, as in *Brignoni-Ponce*, to require that Border Patrol officers act upon at least reasonable suspicion in making checkpoint stops. In any event, even if a different balance were struck, the Court cannot, without ignoring the Fourth Amendment requirement of reasonableness, justify wholly unguided seizures by officials manning the checkpoints. The Court argues, however, that practicalities necessitate otherwise: "A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." *Ante*, at 557.

As an initial matter, whatever force this argument may have, it cannot apply to the secondary detentions that occurred in No. 74–1560. Once a vehicle has been slowed and observed at a checkpoint, ample opportunity

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checkpoints and that the burden of checkpoint intrusions will lie heaviest on them. That, as the Court observes, *ante*, at 563 n. 16, "[l]ess than 1% of the motorists passing the checkpoint are stopped for questioning," whereas approximately 16% of the population of California is Spanish-speaking or of Spanish surname, has little bearing on this point—or, for that matter, on the integrity of Border Patrol practices. There is no indication how many of the 16% have physical and grooming characteristics identifiable as Mexican. There is no indication what portion of the motoring public in California is of Spanish or Mexican ancestry. Given the socioeconomic status of this portion, it is likely that the figure is significantly less than 16%. Neither is there any indication that those of Mexican ancestry are not subjected to lengthier initial stops than others, even if they are not secondarily detained. Finally, there is no indication of the ancestral makeup of the 1% who are referred for secondary detention. If, as is quite likely the case, it is overwhelmingly Mexican, the sense of discrimination which will be felt is only enhanced.

exists to formulate the reasonable suspicion which, if it actually exists, would justify further detention. Indeed, though permitting roving stops based on reasonable suspicion, *Brignoni-Ponce* required that "any further detention or search must be based on [the greater showing of] consent or probable cause." 422 U. S., at 882. The Court today, however, does not impose a requirement of even reasonable suspicion for these secondary stops.

The Court's rationale is also not persuasive because several of the factors upon which officers may rely in establishing reasonable suspicion are readily ascertainable, regardless of the flow of traffic. For example, with checkpoint stops as with roving-patrol stops, "[a]spects of the vehicle itself may justify suspicion." *Id.*, at 885. Thus it is relevant that the vehicle is a certain type of station wagon, appears to be heavily loaded, contains an extraordinary number of persons, or contains persons trying to hide. See *ibid.* If such factors are satisfactory to permit the imposition of a reasonable-suspicion requirement in the more demanding circumstances of a roving patrol, where officers initially deal with a vehicle traveling, not at a crawl, but at highway speeds, they clearly should suffice in the circumstances of a checkpoint stop.

Finally, the Court's argument fails for more basic reasons. There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied. Dispensing with reasonable suspicion as a prerequisite to stopping and inspecting motorists because the inconvenience of such a requirement would make it impossible to identify a given car as a possible carrier of aliens is no more justifiable than dispensing with probable cause as prerequisite to the search of an individual because the inconvenience of

such a requirement would make it impossible to identify a given person in a high-crime area as a possible carrier of concealed weapons. "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez* v. *United States*, 413 U. S., at 273.

The Court also attempts to justify its approval of standardless conduct on the ground that checkpoint stops "involve less discretionary enforcement activity" than roving stops. *Ante*, at 559. This view is at odds with its later more revealing statement that "officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved." *Ante*, at 564. Similarly unpersuasive is the statement that "since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." *Ante*, at 559.[5] The Fourth Amendment stand-

[5] As an empirical proposition, this observation is hardly self-evident. No small number of vehicles pass through a checkpoint. Indeed, better than 1,000 pass through the San Clemente checkpoint during each hour of operation. *Ante*, at 554. Thus there is clearly abundant opportunity for abuse and harassment at checkpoints through lengthier detention and questioning of some individuals or arbitrary secondary detentions. Such practices need not be confined to those of Mexican ancestry. And given that it is easier to deal with a vehicle which has already been slowed than it is to observe and then chase and apprehend a vehicle travelling at highway speeds, if anything, there is more, not less, room for abuse or harassment at checkpoints. Indeed, in *Ortiz*, the Court was "not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search." 422 U. S., at 895. *A fortiori*, discretion can be no more limited simply because the activity is detention or questioning rather than searching.

ard of reasonableness admits of neither intrusion at the discretion of law enforcement personnel nor abusive or harassing stops, however infrequent. Action based merely on whatever may pique the curiosity of a particular officer is the antithesis of the objective standards requisite to reasonable conduct and to avoiding abuse and harassment. Such action, which the Court now permits, has expressly been condemned as contrary to basic Fourth Amendment principles. Certainly today's holding is far removed from the proposition emphatically affirmed in *United States* v. *United States District Court,* 407 U. S. 297, 317 (1972), that "those charged with . . . investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy . . . ." Indeed, it is far removed from the even more recent affirmation that "the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States* v. *Ortiz,* 422 U. S., at 895.[6]

[6] *Camara* v. *Municipal Court,* 387 U. S. 523 (1967), does not support the Court's result. Contrary to the Court's characterization, *ante,* at 561, the searches condoned there were not "routine intrusions." The Court required that administrative searches proceed according to reasonable standards satisfied with respect to each particular dwelling searched. 387 U. S., at 538. The search of any dwelling at the whim of administrative personnel was not permitted. The Court, however, imposes no such standards today. Instead, any vehicle and its passengers are subject to detention at a fixed checkpoint, and "no particularized reason need exist to justify" the detention. *Ante,* at 563. To paraphrase an apposite observation by the Court in *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 270 (1973), "[checkpoints] thus embodied precisely the

The cornerstone of this society, indeed of any free society, is orderly procedure. The Constitution, as originally adopted, was therefore, in great measure, a procedural document. For the same reasons the drafters of the Bill of Rights largely placed their faith in procedural limitations on government action. The Fourth Amendment's requirement that searches and seizures be reasonable enforces this fundamental understanding in erecting its buffer against the arbitrary treatment of citizens by government. But to permit, as the Court does today, police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of a government, for, as Mr. Justice Frankfurter reminded us, "[t]he history of American freedom is, in no small measure, the history of procedure." *Malinski* v. *New York*, 324 U. S. 401, 414 (1945).

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evil the Court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed . . . ."

Syllabus

# CANTOR, DBA SELDEN DRUGS CO. *v.* DETROIT EDISON CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75–122. Argued January 14, 1976—Decided July 6, 1976

Respondent, a private utility that is the sole supplier of electricity in southeastern Michigan, also furnishes its residential customers, without additional charge, with almost 50% of the most frequently used standard-size light bulbs under a longstanding practice antedating state regulation of electric utilities. This marketing practice for light bulbs is approved, as part of respondent's rate structure, by the Michigan Public Service Commission, and may not be changed unless and until respondent files, and the Commission approves, a new tariff. Petitioner, a retail druggist selling light bulbs, brought an action against respondent, claiming that it was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs in violation of the Sherman Act. The District Court entered a summary judgment against petitioner, holding on the authority of *Parker* v. *Brown*, 317 U. S. 341, that the Commission's approval of respondent's light-bulb marketing practices exempted the practices from the federal antitrust laws, and the Court of Appeals affirmed. *Held:* Neither Michigan's approval of respondent's present tariff nor the fact that the light-bulb-exchange program may not be terminated until a new tariff is filed, is sufficient basis for implying an exemption from the federal antitrust laws for that program. Pp. 592–598.

(a) The State's participation in the decision to have a light-bulb exchange program is not so dominant that it is unfair to hold a private party responsible for its conduct in implementing the decision, but rather the respondent's participation in the decision is sufficiently significant to require that its conduct, like comparable conduct by unregulated businesses, conform to applicable federal law. Pp. 592–595.

(b) Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust

standards. Merely because certain conduct may be subject to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards, but, even assuming inconsistency, this would not mean that the federal interest must inevitably be subordinated to the State's; moreover, even assuming that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, the enforcement of the antitrust laws would not be foreclosed in an essentially unregulated area such as the electric light-bulb market. Pp. 595–598.

513 F. 2d 630, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, and in which (except as to Parts II and IV) BURGER, C. J., joined. BURGER, C. J., filed an opinion concurring in the judgment, and concurring in part, *post*, p. 603. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 605. STEWART, J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 614.

*Burton I. Weinstein* argued the cause for petitioner. With him on the briefs were *Robert A. Holstein*, *Michael L. Sklar*, and *David L. Nelson*.

*George D. Reycraft* argued the cause for respondent. With him on the brief were *Donald I. Baker*, *Leon S. Cohan*, and *Dean J. Landau*.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Kauper*, *Barry Grossman*, and *Carl D. Lawson*.

*Howard J. Trienens* argued the cause for Michigan Bell Telephone Co. et al. as *amici curiae* urging affirmance. With him on the brief were *Theodore N. Miller* and *C. John Buresh*.*

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**Sumner J. Katz* filed a brief for the National Association of Regulatory Utility Commissioners as *amicus curiae* urging affirmance.

MR. JUSTICE STEVENS delivered the opinion of the Court.†

In *Parker* v. *Brown*, 317 U. S. 341, the Court held that the Sherman Act was not violated by state action displacing competition in the marketing of raisins. In this case we must decide whether the *Parker* rationale immunizes private action which has been approved by a State and which must be continued while the state approval remains effective.

The Michigan Public Service Commission pervasively regulates the distribution of electricity within the State and also has given its approval to a marketing practice which has a substantial impact on the otherwise unregulated business of distributing electric light bulbs. Assuming, *arguendo*, that the approved practice has unreasonably restrained trade in the light-bulb market, the District Court [1] and the Court of Appeals [2] held, on the authority of *Parker*, that the Commission's approval exempted the practice from the federal antitrust laws. Because we questioned the applicability of *Parker* to this situation, we granted certiorari, 423 U. S. 821. We now reverse.

Petitioner, a retail druggist selling light bulbs, claims that respondent is using its monopoly power in the distribution of electricity to restrain competition in the sale of bulbs in violation of the Sherman Act.[3] Discovery

†Parts II and IV of this opinion are joined only by MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL.

[1] 392 F. Supp. 1110 (ED Mich. 1974).

[2] 513 F. 2d 630 (CA6 1975).

[3] Petitioner's complaint asserts that respondent's light-bulb-exchange program violates § 2 of the Sherman Act, 15 U. S. C. § 2, and § 3 of the Clayton Act, 15 U. S. C. § 14. In his brief in this Court, petitioner has also argued that the program constitutes unlawful tying violative of § 1 of the Sherman Act. The complaint seeks treble damages and an injunction permanently enjoining

and argument in connection with defendant's motion for summary judgment were limited by stipulation to the issue raised by the Commission's approval of respondent's light-bulb-exchange program. We state only the facts pertinent to that issue and assume, without opining, that without such approval an antitrust violation would exist. To the extent that the facts are disputed, we must resolve doubts in favor of the petitioner since summary judgment was entered against him. We first describe respondent's "lamp exchange program," we next discuss the holding in *Parker* v. *Brown*, and then we consider whether that holding should be extended to cover this case. Finally, we comment briefly on additional authorities on which respondent relies.

## I

Respondent, the Detroit Edison Co., distributes electricity and electric light bulbs to about five million people in southeastern Michigan. In this marketing area, respondent is the sole supplier of electricity, and supplies consumers with almost 50% of the standard-size light bulbs they use most frequently.[4] Customers are billed for the electricity they consume, but pay no separate charge for light bulbs. Respondent's rates, including the omission of any separate charge for bulbs, have been approved by the Michigan Public Service Commission, and may not be changed without the Commission's approval. Respondent must, therefore, con-

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respondent from requiring the purchase of bulbs in connection with the sale of electrical energy. The complaint purports to be filed on behalf of all persons similarly situated, but the record contains no indication that the plaintiff moved for a class determination pursuant to Fed. Rule Civ. Proc. 23 (c).

[4] Respondent does not distribute fluorescent lights or high-intensity discharge lamps; if bulbs of those types were included, respondent's share of the market would only be about 23%.

tinue its lamp-exchange program until it files a new tariff and that new tariff is approved by the Commission.

Respondent, or a predecessor, has been following the practice of providing limited amounts of light bulbs to its customers without additional charge since 1886.[5] In 1909 the State of Michigan began regulation of electric utilities.[6] In 1916 the Michigan Public Service Commission first approved a tariff filed by respondent setting forth the lamp-supply program. Thereafter, the Commission's approval of respondent's tariffs has included implicit approval of the lamp-exchange program. In 1964 the Commission also approved respondent's decision to eliminate the program for large commercial customers.[7] The elimination of the service for such customers became effective as part of a general rate reduction for those customers.

In 1972 respondent provided its residential customers with 18,564,381 bulbs at a cost of $2,835,000.[8] In its accounting to the Michigan Public Service Commission, respondent included this amount as a portion of its cost of providing service to its customers. Respondent's accounting records reflect no direct profit as a result of the

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[5] Under respondent's practice, new residential customers are provided with bulbs in "such quantities as may be needed" for all of their permanent fixtures; thereafter, respondent replaces residential customers' burned out light bulbs in proportion to their estimated use of electricity for lighting. The customer incurs no direct charge for such bulbs at the time they are furnished to him, but normally turns in any burned-out bulbs to obtain a new supply.

[6] See Mich. Comp. Laws §§ 460.551, 460.559 (1970).

[7] Apparently many commercial customers use relatively large quantities of fluorescent lighting and therefore have less interest in the bulb-exchange program.

[8] Of this amount, $2,363,328 was paid to the three principal manufacturers of bulbs from whom respondent made its purchases; the other $471,672 represented costs incurred in the use of respondent's personnel and facilities in carrying out the program.

distribution of bulbs. The purpose of the program, according to respondent's executives, is to increase the consumption of electricity. The effect of the program, according to petitioner, is to foreclose competition in a substantial segment of the light-bulb market.[9]

The distribution of electricity in Michigan is pervasively regulated by the Michigan Public Service Commission. A Michigan statute[10] vests the Commission with "complete power and jurisdiction to regulate all public utilities in the state . . . ." The statute confers express power on the Commission "to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities." Respondent advises us that the heart of the Commission's function is to regulate the " 'furnishing . . . [of] electricity for the production of light, heat or power . . . .' "[11]

The distribution of electric light bulbs in Michigan is unregulated. The statute creating the Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan statute authorize the regulation of that business. Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light-bulb market. Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no

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[9] According to respondent the effect of the program is to save consumers about $3 million a year, since the bulbs they now receive at a cost of $2,835,000 would cost them about $6 million in the retail market.

[10] Mich. Comp. Laws § 460.6 (1970).

[11] See Brief for Respondent 11; Mich. Comp. Laws § 460.501 (1970).

additional charge. The Commission's approval of respondent's decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program.

Although there is no statute, Commission rule, or policy which would prevent respondent from abandoning the program merely by filing a new tariff providing for a proper adjustment in its rates, it is nevertheless apparent that while the existing tariff remains in effect, respondent may not abandon the program without violating a Commission order, and therefore without violating state law. It has, therefore, been permitted by the Commission to carry out the program, and also is required to continue to do so until an appropriate filing has been made and has received the approval of the Commission.

Petitioner has not named any public official as a party to this litigation and has made no claim that any representative of the State of Michigan has acted unlawfully.

## II

In *Parker* v. *Brown* the Court considered whether the Sherman Act applied to state action. The way the Sherman Act question was presented and argued in that case sheds significant light on the character of the state-action concept embraced by the *Parker* holding.

The plaintiff, Brown, was a producer and packer of raisins; the defendants were the California Director of Agriculture and other public officials charged by California statute with responsibility for administering a program for the marketing of the 1940 crop of raisins. The express purpose of the program was to restrict competition among the growers and maintain prices in the dis-

tribution of raisins to packers.[12] Nevertheless, in the District Court, Brown did not argue that the defendants had violated the Sherman Act. He sought an injunction against the enforcement of the program on the theory that it interfered with his constitutional right to engage in interstate commerce. Because he was attacking the constitutionality of a California statute and regulations having statewide applicability, a three-judge District Court was convened.[13] With one judge dissenting, the District Court held that the program violated the Commerce Clause and granted injunctive relief.[14]

The defendant state officials took a direct appeal to this Court. Probable jurisdiction was noted on April 6, 1942, and the Court heard oral argument on the Com-

[12] "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state." 317 U. S., at 346.

"The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to 'conserve agricultural wealth of the state' by raising and maintaining prices, but 'without permitting unreasonable profits to producers.' § 10." *Id.*, at 355.

[13] Title 28 U. S. C. § 2281 has been consistently read by this Court as authorizing a three-judge court only when the state statute which is sought to be enjoined is of a general and statewide application. *Moody* v. *Flowers*, 387 U. S. 97, 101.

[14] Article I, § 8, cl. 3, of the United States Constitution provides: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

merce Clause issue on May 5, 1942. In the meantime, on April 27, 1942, the Court held that the State of Georgia is a "person" within the meaning of § 7 of the Sherman Act and therefore entitled to maintain an action for treble damages. *Georgia* v. *Evans,* 316 U. S. 159.

Presumably because the Court was then concerned with the relationship between the sovereign States and the antitrust laws, it immediately set *Parker* v. *Brown* for reargument [15] and, on its own motion, requested the Solicitor General of the United States to file a brief as *amicus curiae* and directed the parties to discuss the question whether the California statute was rendered invalid by the Sherman Act.[16]

In his supplemental brief the Attorney General of

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[15] The Court also asked the parties to consider whether the Agricultural Adjustment Act, as amended, or any other Act of Congress, invalidated the California program. The supplemental briefs noted that the California program had been adopted with the collaboration of officials of the United States Department of Agriculture, and had been aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture. These facts were emphasized in portions of Mr. Chief Justice Stone's opinion discussing the Agricultural Adjustment Act and the Commerce Clause, see 317 U. S., at 357, 358–359, 368, but were not mentioned in connection with the Court's discussion of the Sherman Act.

[16] The first order entered in the Supreme Court Journal on Monday, May 11, 1942, provided:

"No. 1040. W. B. Parker, Director of Agriculture, et al., appellants, v. Porter L. Brown. This cause is restored to the docket for reargument on October 12 next. In their briefs and on the oral argument counsel for the parties are requested to discuss the questions whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act, the Agricultural Adjustment Act as amended, or any other Act of Congress. The Solicitor General is requested to file a brief as *amicus curiae* and, if he so desires, to participate in the oral argument." Journal, O. T. 1941, p. 252.

California [17] advanced three arguments against using the Sherman Act as a basis for upholding the injunction entered by the District Court. He contended (1) that even though a State is a "person" entitled to maintain a treble-damage action as a plaintiff, Congress never intended to subject a sovereign State to the provisions of the Sherman Act; (2) that the California program did not, in any event, violate the federal statute; and (3) that since no evidence or argument pertaining to the Sherman Act had been offered or considered in the District Court, the injunction should not be sustained on an antitrust theory.[18]

In his brief for the United States as *amicus curiae*, the Solicitor General did not take issue with the appellants' first argument. He contended that the California program was inconsistent with the policy of the Sherman Act, but expressly disclaimed any argument that the State of California or its officials had violated federal law.[19] Later in his brief the Solicitor General drew an

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[17] The Honorable Earl Warren, later Chief Justice of the United States.

[18] In the index to his supplemental brief, the California Attorney General outlined his discussion of the Sherman Act in these words:

"The Sherman Anti-Trust law and the California raisin program ..... 35
"1. Is a state subject to the Sherman Act?..... 35
"2. Does the state seasonal program for raisins violate the provisions of the Sherman Act?..... 48
"(a) The Sherman Act is circumscribed by the rule of reason ..... 53
"(b) Federal legislation as exempting state program from anti-trust laws..... 60
"3. May the California raisin program be enjoined in the present action?..... 64"

[19] At p. 59 of its brief, the Government stated:

"The Sherman Act does not in terms define its scope in so far as it applies to the activities of state governments. But nothing

important distinction between economic action taken by the State itself and private action taken pursuant to a state statute permitting or requiring individuals to engage in conduct prohibited by the Sherman Act. The Solicitor General contended that the private conduct would clearly be illegal but recognized that a different problem existed with respect to the State itself.[20] It was the latter problem that was presented in the *Parker* case.

This Court set aside the injunction entered by the District Court. In the portion of his opinion for the Court discussing the Sherman Act issue, Mr. Chief Justice Stone addressed only the first of the three arguments advanced by the California Attorney General. The Court held that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act.[21]

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in the Act precludes its application to programs sponsored by the states. Sections 1 and 2 prohibit unlawful conduct by 'persons,' and the word 'person,' as defined in Section 7, in some connections at least, may include a state. *Georgia* v. *Evans*, 316 U. S. 159.

"But the question we face here is not whether California or its officials have violated the Sherman Act, but whether the state program interferes with the accomplishment of the objectives of the federal statute."

[20] At p. 63 of its brief, the Government stated:

"A state statute permitting, or requiring, dealers in a commodity to combine so as to limit the supply or raise the price of a subject of interstate commerce would clearly be void. The question here is whether a state may itself undertake to control the supply and price of a commodity shipped in interstate commerce or otherwise restrain interstate competition through a mandatory regulation."

[21] "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become

This narrow holding made it unnecessary for the Court to agree or to disagree with the Solicitor General's view that a state statute permitting or requiring private conduct prohibited by federal law "would clearly be void." [22] The Court's narrow holding also avoided any question about the applicability of the antitrust laws to private action taken under color of state law.

Unquestionably the term "state action" may be used broadly to encompass individual action supported to some extent by state law or custom. Such a broad use of the term, which is familiar in civil rights litigation,[23] is not,

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effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

. . . . .

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' 21 Cong. Rec. 2562, 2457; see also [*id.*,] at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

. . . . .

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen* v. *Smith*, 195 U. S. 332, 344–[3]45; cf. *Lowenstein* v. *Evans*, 69 F. 908, 910." 317 U. S., at 350–352.

[22] See n. 15, *supra*.

[23] See *Monroe* v. *Pape*, 365 U. S. 167, 172–187; *Adickes* v. *Kress*

however, what Mr. Chief Justice Stone described in his *Parker* opinion. He carefully selected language which plainly limited the Court's holding to official action taken by state officials.[24]

In this case, unlike *Parker,* the only defendant is a private utility. No public officials or agencies are named as parties and there is no claim that any state action violated the antitrust laws. Conversely, in *Parker* there was no claim that any private citizen or company had violated the law. The only Sherman Act issue decided was whether the sovereign State itself, which had been held to be a person within the meaning of § 7 of the statute, was also subject to its prohibitions. Since the case now before us does not call into question the legality of any

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*& Co.,* 398 U. S. 144, 188–234 (BRENNAN, J., concurring in part and dissenting in part).

[24] In his three-page discussion of the Sherman Act issue in *Parker* v. *Brown,* Mr. Chief Justice Stone made 13 references to the fact that state action was involved. Each time his language was carefully chosen to apply only to official action, as opposed to private action approved, supported, or even directed by the State. Thus, his references were to (1) "the legislative command of the state," and (2) "a state or its officers or agents from activities directed by its legislature," 317 U. S., at 350; and to (3) "a state's control over its officers and agents," (4) "the state as such," (5) "state action or official action directed by a state," and (6) "state action," *id.,* at 351; and to (7) "the state command to the Commission and to the program committee," (8) "state action," (9) "the state which has created the machinery for establishing the prorate progam," (10) "it is the state, acting through the Commission, which adopts the program . . . ," (11) "[t]he state itself exercises its legislative authority," (12) "[t]he state in adopting and enforcing the prorate program . . . ," and finally (13) "as sovereign, imposed the restraint as an act of government . . . ," *id.,* at 352.

The cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State), on the other hand.

act of the State of Michigan or any of its officials or agents, it is not controlled by the *Parker* decision.

## III

In this case we are asked to hold that private conduct required by state law is exempt from the Sherman Act. Two quite different reasons might support such a rule. First, if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law. Second, if the State is already regulating an area of the economy, it is arguable that Congress did not intend to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism. We consider these two reasons separately.

We may assume, *arguendo*, that it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command. Such an assumption would not decide this case, if, indeed, it would decide any actual case. For typically cases of this kind involve a blend of private and public decisionmaking.[25] The Court has already decided that state authorization,[26] approval,[27] encouragement,[28] or

[25] Indeed, in *Parker* v. *Brown* itself, there was significant private participation in the formulation and effectuation of the proration program. As the Court pointed out, approval of the program upon referendum by a prescribed number of producers was one of the conditions for effectuating the program. See *ibid.*

[26] "It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 346.

[27] In the *Parker* opinion itself, the Court pointed out that a State does not give immunity to those who violate the Sherman Act "by declaring that their action is lawful." 317 U. S., at 351.

[28] "Respondents' arguments, at most, constitute the contention

participation [29] in restrictive private conduct confers no antitrust immunity. And in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, the Court invalidated the plaintiff's entire resale price maintenance program even though it was effective throughout the State only because the Louisiana statute imposed a direct restraint on retailers who had not signed fair trade agreements.[30]

In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.

The case before us also discloses a program which is the product of a decision in which both the respondent and the

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that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign," *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791.

[29] See *Continental Co.* v. *Union Carbide*, 370 U. S. 690; cf. also *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, cited in *Parker* v. *Brown*, *supra*, at 352.

[30] Thus, although the private decision to enforce a statewide fair trade program was not only approved by the State, but actually would have been ineffective without the statutory command to nonsigners to adhere to the prices set by the plaintiff, the rationale of *Parker* v. *Brown* did not immunize the restraint. Quite the contrary, in his opinion for the Court Mr. Justice Douglas cited *Parker* for the proposition that private conduct was forbidden by the Sherman Act even though the State had compelled retailers to follow a parallel price policy. He said: "Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker* v. *Brown*, 317 U. S. 341, 350." 341 U. S.. at 389.

Commission participated. Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's.[31] Indeed, respondent initiated the program years before the regulatory agency was even created. There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law.[32] Accordingly, even though there may be cases in which the State's participation in a decision is so dom-

[31] We recently described an analogous exercise of a public utility's power to make business decisions subject to Commission approval in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345:

"The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Id.*, at 357. (Footnote omitted.)

[32] Nor is such a conclusion even arguably inconsistent with the underlying rationale of *Parker* v. *Brown*. For in that case California required every raisin producer in the State to comply with the proration program, whereas Michigan has never required any utility to adopt a lamp-exchange program.

inant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness.

Apart from the question of fairness to the individual who must conform not only to state regulation but to the federal antitrust laws as well, we must consider whether Congress intended to superimpose antitrust standards on conduct already being regulated under a different standard. *Amici curiae* forcefully contend that the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the "public interest" standard widely enforced by regulatory agencies, and that the essential teaching of *Parker* v. *Brown* is that the federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies.

There are at least three reasons why this argument is unacceptable. First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.

Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker*, were of that character. But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically

assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation.[33] There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.[34] Thus, Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards.[35]

The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws.[36] Therefore, assuming that there are situations in

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[33] As MR. JUSTICE STEWART pointed out in his dissenting opinion in *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 389, the "very reason for the regulation of private utility rates—by state bodies and by the Commission—is the inevitability of a monopoly that requires price control to take the place of price competition."

[34] Commenting on a possible conflict between federal regulatory policy and federal antitrust policy we have repeatedly said " '[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the . . . [Act] work, and even then only to the minimum extent necessary.' " *Id.*, at 391, quoting *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357.

[35] Indeed, since our decision in *Otter Tail Power Co.* v. *United States*, *supra*, there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities. Although there was dissent from the particular application of the statute in that case, there was no dissent from the basic proposition that such utilities must obey the federal antitrust laws.

[36] Respondent does not argue that state regulation provides a

which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.

The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, "and even then only to the minimum extent necessary." [37]

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stronger justification for an implied exemption than federal regulation. On the contrary, respondent relies heavily on *Gordon* v. *New York Stock Exchange,* 422 U. S. 659, in which the Court upheld the fixed commissions of the stock exchange as an integral part of the effective operation of the Securities Exchange Act of 1934. The inapplicability of that case is manifest from MR. JUSTICE STEWART's brief concurring opinion in which he stated:

"The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found only if there exists a 'plain repugnancy between the antitrust and regulatory provisions.' *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 351.

"The mere existence of the Commission's reserve power of oversight with respect to rules initially adopted by the exchanges, therefore, does not necessarily immunize those rules from antitrust attack. . . . The question presented by the present case, therefore, is whether exchange rules fixing minimum commission rates are 'necessary to make the Securities Exchange Act work.'" *Id.,* at 692–693.

The lamp-supply program is by no means comparably imperative in the continued effective functioning of Michigan's regulation of the utilities industry.

[37] See n. 34, *supra.* Recent cases make it clear that the relevant "'aspect of the agency's jurisdiction must be sufficiently central to the purpcses of the enabling statute so that implied repeal of the antitrust laws is 'necessary to make the [regulatory

The application of that standard to this case inexorably requires rejection of respondent's claim. For Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's light-bulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired.

We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program.[38]

## IV

The dissenting opinion voices the legitimate concern that violation of the antitrust laws by regulated companies may give rise to "massive treble damage liabilities." This is an oft-repeated criticism of the inevitably

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scheme] work.'" Robinson, Recent Antitrust Developments: 1975, 31 Record of N. Y. C. B. A. 38, 57–58 (1976).

In *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719–720, the Court pointed out:

"Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. See, *e. g.*, *United States* v. *Philadelphia Nat. Bank*, 374 U. S., at 348; *United States* v. *Borden Co.*, 308 U. S. 188, 197–206 (1939)."

These cases are, of course, consistent with the "cardinal rule," applicable to legislation generally, that repeals by implication are not favored. *Posadas* v. *National City Bank*, 296 U. S. 497, 503.

[38] Of course, the absence of an exemption from the antitrust laws does not mean that those laws have been violated.

imprecise language of the Sherman Act and of the consequent difficulty in predicting with certainty its application to various specific fact situations.[39] The far-reaching value of this basic part of our law, however, has enabled it to withstand such criticism in the past.[40]

The concern about treble-damage liability has arguable relevance to this case in two ways. If the hazard of violating the antitrust laws were enhanced by the fact of regulation, or if a regulated company had engaged in anticompetitive conduct in reliance on a justified understanding that such conduct was immune from the antitrust laws, a concern with the punitive aspects of the treble-damage remedy would be appropriate. But neither of those circumstances is present in this case.

When regulation merely takes the form of approval of a tariff proposed by the company, it surely has not increased the company's risk of violating the law. The

[39] It is this concern which has repeatedly prompted the introduction of bills which, if adopted, would make the award of treble damages in antitrust litigation discretionary rather than mandatory. See Report of the Attorney General's National Committee to Study the Antitrust Laws 378–380 (1955). See also, *e. g.*, H. R. 978, 85th Cong., 1st Sess. (1957); H. R. 190, 87th Cong., 1st Sess. (1961).

[40] "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis." *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359–360.

respondent utility maintained its lamp-exchange program both before and after it was regulated. The approval of the program by the Michigan Commission provided the company with an arguable defense to the antitrust charge, but did not increase its exposure to liability.

Nor can the utility fairly claim that it was led to believe that its conduct was exempt from the federal antitrust laws. A claim of immunity or exemption is in the nature of an affirmative defense to conduct which is otherwise assumed to be unlawful. This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law.

In the Court's most recent consideration of this subject, it described the defendant's claim with pointed precision as "this so-called state-action exemption." *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 788. The Court then explained that the question whether the anticompetitive activity had been required by the State acting as sovereign was the "threshold inquiry" in determining whether it was state action of the type the Sherman Act was not meant to proscribe.[41] Certainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal antitrust immunity.

The dissenting opinion in this case makes much of the obvious fact that *Parker* v. *Brown* implicitly held that California's raisin-marketing program was not a violation of the Sherman Act. That is, of course, perfectly

[41] "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker* v. *Brown,* 317 U. S., at 350–352; *Continental Co.* v. *Union Carbide,* 370 U. S. 690, 706–707 (1962)." 421 U. S., at 790.

true. But the only way the legality of any program may be tested under the Sherman Act is by determining whether the persons who administer it have acted lawfully. The federal statute proscribes the conduct of persons, not programs, and the narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such charges were made.[42] Even if the state program had been held unlawful, such a holding would not necessarily have supported a claim that private individuals who had merely conformed their conduct to an invalid program had thereby violated the Sherman Act. Unless and until a court answered that question, there would be no occasion to consider an affirmative defense of immunity or exemption.

Nor could respondent justifiably rely on either the holding in *Eastern R. Conf.* v. *Noerr Motors,* 365 U. S. 127, or the reference in that opinion to *Parker.*[43] The holding in *Noerr* was that the concerted activities of the railroad defendants in opposing legislation favorable to the plaintiff motor carriers was not prohibited by the Sherman Act. The case did not involve any question of either liability or exemption for private action taken in compliance with state law.

Moreover, nothing in the *Noerr* opinion implies that

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[42] Indeed, it did not even occur to the plaintiff that the state officials might have violated the Sherman Act; that question was first raised by this Court.

[43] Actually the reference was primarily to *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, and only secondarily to *Parker.* See 365 U. S., at 136 n. 15.

the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct. The passage quoted in the dissent, *post*, at 622, sets up an assumed dichotomy between a restraint imposed by governmental action, as contrasted with one imposed by private action, and then cites *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, and *Parker* for the conclusion that the former does not violate the Sherman Act.[44] That passing reference to *Parker* sheds no light on the significance of state action which amounts to little more than approval of a private proposal. It surely does not qualify the categorical statement in *Parker* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U. S., at 351. Yet the dissent would allow every state agency to grant precisely that immunity by merely including a direction to engage in the proposed conduct in an approval order.[45]

[44] "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co.* v. *United States*, [221 U. S. 1,] that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." (*Rock Royal* and *Parker* are then cited in the footnote which is omitted.) 365 U. S., at 135–136.

[45] MR. JUSTICE STEWART's analysis rests largely on the dubious assumption that if each of several steps in the implementation of an anticompetitive program is lawful, the entire program must be equally lawful.

MR. JUSTICE STEWART's separate opinion possesses a virtue which ours does not. It announces a simple rule that can easily be applied in any case in which a state regulatory agency approves a proposal and orders a regulated company to comply with it. No matter what the impact of the proposal on interstate commerce, and no matter how peripheral or casual the State's interests may be in permitting it to go into effect, the state act would confer immunity from treble-damages liability. Such a rule is supported by the wholesome interest in simplicity in the regulation of a complex economy. In our judgment, however, that interest is heavily outweighed by the fact that such a rule may give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest. Although it is tempting to try to fashion a rule which would govern the decision of the liability issue and the damages issue in all future cases presenting state-action issues, we believe the Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies.

Since the District Court has not yet addressed the question whether the complaint alleged a violation of the antitrust laws, the case is remanded for a determination of that question and for such other proceedings as may be appropriate.

*Reversed and remanded.*

MR. CHIEF JUSTICE BURGER, concurring in the judgment and in all except Parts II and IV of the Court's opinion.

I concur in the judgment and in all except Parts II and IV of the Court's opinion. I do not agree, however, that *Parker* v. *Brown,* 317 U. S. 341 (1943), can logically be

limited to suits against state officials. In interpreting *Parker*, the Court has heretofore focused on the challenged *activity*, not upon the identity of the *parties* to the suit.

> "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the *activity* is required by the State acting as sovereign." *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 790 (1975) (emphasis added).

If *Parker*'s holding were limited simply to the nonliability of state officials, then the Court's inquiry in *Goldfarb* as to the County Bar Association's claimed exemption could have ended upon our recognition that the organization was "a voluntary association and not a state agency . . . ." 421 U. S., at 790. Yet, before determining that there was no exemption from the antitrust laws, the Court proceeded to treat the Association's contention that its action, having been "prompted" by the State Bar, was "state action for Sherman Act purposes." *Ibid.*

The reading of *Parker* in Part II is unnecessary to the result in this case; that decision simply does not address the precise issue raised by the present case. There was no need in *Parker* to focus upon the situation where the State, in addition to requiring a public utility "to meet regulatory criteria insofar as it is exercising its natural monopoly powers," *ante*, at 596, also purports, without any independent regulatory purpose, to control the utility's activities in separate, competitive markets. Today the Court correctly concludes:

> "The Commission's approval of respondent's decision to maintain such a program does not . . . implement any statewide policy relating to light bulbs. We infer that the State's policy is *neutral* on the ques-

> tion whether a utility should, or should not, have such a program." *Ante,* at 585 (emphasis added).

To find a "state action" exemption on the basis of Michigan's undifferentiated sanction of this ancillary practice could serve no federal or state policy.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court insofar as it holds that the fact that anticompetitive conduct is sanctioned, or even required, by state law does not of itself put that conduct beyond the reach of the Sherman Act. Since the opposite proposition is the ground on which the Court of Appeals affirmed the dismissal of this suit, I also agree that its judgment must be reversed. My approach, however, is somewhat different from that of the Court.

## I

As to the principal question in the case, that of the Sherman Act's pre-emptive effect upon inconsistent state laws, it is, as the dissent points out, one of congressional intent. No one denies that Congress could, if it wished, override those state laws whose operation would subvert the federal policy of free competition in interstate commerce. In discerning that intent, however, I find somewhat less assistance in the legislative history than does the dissent. It is true that the framers of the Sherman Act expressed the view that certain areas of economic activity were left entirely to state regulation. The dissent quotes several of these expressions. *Post,* at 632–634. A careful reading of those statements reveals, however, that they little more than reflect the then-prevailing view that Congress lacked the *power,* under the Commerce Clause, to regulate economic activity that was within the domain of the States. The Court since then has recognized a greatly expanded Commerce Clause

power. Arguably, the Sherman Act should have remained confined within the outlines of that power as it was thought to exist in 1890, on the theory that if Congress believed it could not regulate any more broadly, it must not have attempted to do so. But that bridge already has been crossed, for it has been held that Congress intended the reach of the Sherman Act to expand along with that of the commerce power. *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 743 n. 2 (1976), and cases cited.

Our question in this case is one that the Sherman Act's framers did not directly confront or explicitly address: What was to be the result if the expanding ambit of the Sherman Act should bring it into conflict with inconsistent state law? But it seems to me that this bridge also has been crossed. In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), the issue was whether the Sherman Act permitted enforcement of a Louisiana statute requiring compliance by liquor retailers with resale price agreements to which they were not parties, but which had been entered into by other retailers with their wholesale suppliers. The Court held the Louisiana statute unenforceable; there is no plausible reading of that decision other than that the statute was pre-empted by the Sherman Act.[1] *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), is to the same effect. The defenders of the railroad holding company attacked in that case argued that it was beyond the Sherman Act's reach because it was lawful under the cor-

[1] The Court expressly stated in *Schwegmann:* "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." And again: "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." 341 U. S., at 386, 389.

poration laws of New Jersey. The holding company was nonetheless held unlawful, and, to that extent, the law of New Jersey was forced to give way.[2] Indeed, I suppose that some degree of state-law pre-emption is implicit in the most fundamental operation of the Sherman Act. If a State had no antitrust policy of its own, anticompetitive combinations of all kinds would be sanctioned and enforced under that State's general contract and corporation law. Yet, there has never been any doubt that if such combinations offend the Sherman Act, they are illegal, and state laws to that extent are overridden.[3]

Congress itself has given support to the view that inconsistent state laws are pre-empted by the Sherman Act. Were it the case that state statutes held complete sway, Congress would not have found it necessary in 1937 to pass the Miller-Tydings Fair Trade Act, 50 Stat. 693, amending the Sherman Act, specifically exempting from the latter's operation certain price maintenance agreements sanctioned by state law. 15 U. S. C. § 1. There are other instances of Congress' acting to protect state-sanctioned anticompetitive schemes from the Sher-

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[2] The argument that New Jersey law exempted Northern Securities Company from the Sherman Act was thoroughly canvassed in the plurality opinion. 193 U. S., at 344–351. It was rejected for the reason "that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress." *Id.*, at 350.

[3] In passing, we may cast at least a sidelong glance at a related area of federal trade regulation—that of the patent laws. Although the federal statute is no more explicit on the point than is the Sherman Act, see 35 U. S. C. § 100 *et seq.*, it clearly pre-empts state laws that purport either to expand on or to infringe the federal patent monopoly. See, *e. g.*, *Lear, Inc.* v. *Adkins*, 395 U. S. 653 (1969); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting*, 376 U. S. 234 (1964).

man Act. In response to *Schwegmann*, see H. R. Rep. No. 1437, 82d Cong., 2d Sess., 1–2, Congress in 1952 passed the McGuire bill, 66 Stat. 632, extending the Miller-Tydings exemption to state statutes that enforced resale price agreements against nonsigners. 15 U. S. C. §§ 45 (a)(2) to (5). A similar enactment is the McCarran-Ferguson Act of 1945, 59 Stat. 34, exempting from federal statutes "any law enacted by any State for the purpose of regulating the business of insurance," with provision that the Sherman Act, and other named federal statutes, should apply to that business after a specified date "to the extent that such business is not regulated by State law." 15 U. S. C. § 1012 (b).[4] These express grants of Sherman Act immunity seem significant to me. As the Court stated in *United States* v. *Borden Co.*, 308 U. S. 188, 201 (1939), construing the immunity granted to certain agreements by the Agricultural Mar-

[4] The McCarran-Ferguson Act was passed in reaction to the holding in *United States* v. *Underwriters Assn.*, 322 U. S. 533 (1944), that the business of insurance is "commerce" within the meaning of the Sherman Act. Congress' expressed concern was that the application of that Act would "greatly impair or nullify the regulation of insurance by the States," bringing to a halt their "experimentation and investigation" in the area. The Act was vigorously endorsed by Governors and insurance commissioners of "almost all of the States." The Justice Department, in opposing the McCarran-Ferguson Act, specifically argued that *Parker* v. *Brown*, 317 U. S. 341 (1943), made the legislation unnecessary because it immunized the insurance business insofar as it was regulated by the States. Congress was not so sure:

"*Parker* v. *Brown* dealt with a State commission authorized by State statute to enforce a program in conformity with, if not supplementary to, a Federal statute. Obviously, all State regulation concerning insurance does not and would not fall in such a category." S. Rep. No. 1112, 78th Cong., 2d Sess., 5 (1944).

See also S. Rep. No. 20, 79th Cong., 1st Sess., 1–3 (1945); H. R. Rep. No. 873, 78th Cong., 1st Sess., 7 (1943); H. R. Rep. No. 143, 79th Cong., 1st Sess., 4 (1945).

keting Agreement Act of 1937, "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so."

## II

I also agree with MR. JUSTICE STEVENS that the particular anticompetitive scheme attacked in this case must fall despite the imprimatur it claims to have received from the State of Michigan. To say, as I have, that the Sherman Act generally pre-empts inconsistent state laws is not to answer the much more difficult question as to which such laws are pre-empted and to what extent. I fear there are no easy solutions, though several suggest themselves.

It cannot be decisive, for example, simply that a state law goes so far as to require, rather than simply to authorize, the anticompetitive conduct in question. The Court accepted this as a prerequisite to antitrust immunity in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 790 (1975), but it cannot alone be sufficient. The whole issue in *Schwegmann* was whether the State *could* require obedience to a fixed resale price arrangement. Similarly, compliance with an anticompetitive contract, or adherence to an illegal corporate combination, might well be "required" by a State's general contract and corporation law.

Neither can it be decisive that a particular state-sanctioned scheme was initiated by the private actors rather than by the State. I see no difference in the degree of private initiation as between the marketing arrangement approved in *Parker* v. *Brown,* 317 U. S. 341 (1943) (and properly approved, I think, for reasons set forth below), and the resale price maintenance scheme disapproved in *Schwegmann.* In each case the particular scheme was initiated by the private actors at the invitation of a general statute, with which they may or may

not have had anything to do. The same was true in *Northern Securities*, and the same is true here. To be sure, there is a certain rough justice, as well as an appearance of simplicity, in a rule based upon who actually is responsible for the scheme in question, but I fear that both the justice and the simplicity would prove illusory in the rule's actual application. Every state enactment is initiated, in its way, by its beneficiaries. It would scarcely make sense to immunize only those powerful enough to speak entirely through their governmental representatives, or, for that matter, to stifle such speech with the threat that it will destroy antitrust immunity. Moreover, the process of enactment is likely to involve such a complex interplay between those regulating and those regulated that it will be impossible to identify the true "initiator."

A final, ostensibly simple, solution that I find wanting would be to insist only on some degree of affirmative articulation by the State of its conscientious intent to sanction the challenged scheme, and its reasons therefor. This also is a tempting solution, particularly in this case, where there is little to suggest (at least in recent years) that the Michigan Public Service Commission has even actively considered the light-bulb tie-in, much less articulated a justification for it. Yet such a solution would also lead to perverse results. A regulation whose justification was too plain to require explication would be vulnerable; a questionable one could be immunized if its proponents had the skill or influence to generate the proper legislative history. And, of course, deciding how much "affirmative articulation" of state policy is enough is not a simple matter.

I would apply, at least for now, a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits. This does not mean

that state-sanctioned and private activity are to be treated alike. The former is different because the fact of state sanction figures powerfully in the calculus of harm and benefit. If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a state enactment. I would assess the justifications of such enactments in the same way as is done in equal protection review, and where such justifications are at all substantial (as one would expect them to be in the case of most professional licensing or fee-setting schemes, for example, cf. *Olsen* v. *Smith*, 195 U. S. 332 (1904)), I would be reluctant to find the restraint unreasonable. A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity to the same ends sought to be achieved by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed. One could not doubt the legality of Detroit Edison's electric power monopoly; the fear of such a monopoly is primarily its tendency to charge excessive prices, but its prices in this instance are controlled by the State.

No doubt such a rule of reason will crystallize, as it is applied, into various *per se* rules relating to certain kinds of state enactments, such as the regulation of the classic natural monopoly, the public utility. We should not shrink in our general approach, however, from what seems to me our constitutionally mandated task, one often set for us by conflicting federal and state laws, and that is the balancing of implicated federal and state interests with a view to assuring that when these are truly in conflict, the former prevail.

The dissent's fears on this score appear to me to be exaggerated. The balancing of harm and benefit is, in general, a process with which federal courts are well acquainted in the antitrust field. The special problem of assessing state interests to determine whether they are strong enough to prevail against supreme federal dictates is also a familiar one to the federal courts. Indeed, a state action that interferes with competition not only among its own citizens but also among the States is already subject under the Commerce Clause to much the same searching review of state justifications as is proposed here. See, *e. g.*, *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951) (state restriction on sale of milk not locally processed held invalid because "reasonable and adequate alternatives [were] available" to protect health interests); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 770–784 (1945) (state restriction of train lengths held invalid under the Commerce Clause because "the state [safety] interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service").

## III

By these standards the present case does not seem a difficult one. The light-bulb tie-in presents the usual dangers of such a scheme, principally that respondent will extend its monopoly from the sale of electric power into that of light bulbs, not because it sells better light bulbs, but because its light bulbs are the ones customers must pay for if they are to have light at all. See P. Areeda, Antitrust Analysis 569–570 (2d ed. 1974). On the record before us the scheme appears to be unjustified. No doubt it originated as a means to promote electric power use, but it is difficult to see why a tie-in (rather than an optional, promotional light-bulb sale) was nec-

essary to that end even in the 19th century, laying aside the question whether the promotion of greater electric power use remains today a plausible public goal. Respondent would justify the scheme on the ground of consumer savings, its light bulbs assertedly being cheaper and better than those commercially available. Brief for Respondent 7–9, 41–42. But again, a tie-in is not necessary to pass along these savings. A tie-in is only necessary in order to force consumers to pay for light bulbs from Detroit Edison rather than someone else. But there is no indication that one light bulb does not fit the socket as well as another, or that the sale of light bulbs is in any way crucial to respondent's successful operation. Conceivably, Michigan's aim is the very extension of the monopoly, born of a preference for having light bulbs supplied by one whose prices are already regulated. But ending competition in the light-bulb market cannot be accepted as an adequate state objective without some evidence—of which there is not the least hint in this record—that such competition is in some way ineffective. For all that appears, light-bulb marketing, unlike electric power production, is not a natural monopoly, nor does it implicate health or safety, nor is it beset with problems of instability or other flaws in the competitive market.[5]

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[5] The approach described in the text is entirely consistent with the result reached in *Parker* v. *Brown*. Wildly fluctuating agricultural prices are a prime candidate for some collective scheme that interrupts free competition in order to bring badly needed stability; under the State's close supervision, as was the case in *Parker*, the scheme seems entirely reasonable. I see no reason to disapprove the holding of *Parker*, therefore, and to the extent that the plurality, by stressing the identity of the state defendants in that case, intimates that a different result might have been reached had the raisin growers themselves been sued, I cannot agree.

Neither can I agree with the dissent, however, that *Parker* must be taken to stand for the broad proposition that a State can

This is what I take it the Court means when it says the electric light-bulb market is "essentially unregulated," and on that understanding I agree with its conclusion. It is conceivable that respondent may show, upon further evidence, a sufficient justification for the scheme, but it certainly has not done so as yet.[6]

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that a public utility company, pervasively regulated by a state utility com-

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immunize any conduct from the application of the Sherman Act. It is true, as the dissent points out, that there are statements arguably to that effect in *Parker*, but the opinion is hardly unambiguous on the point. The Court also observed in that case that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U. S., at 351. Moreover, if we must choose between *Parker*'s more categorical statements and the seemingly contrary statements in *Schwegmann* and *Northern Securities*, see nn. 1 and 2, *supra*, I prefer the latter, as more in keeping with the actual holdings of those cases.

[6] MR. JUSTICE STEVENS states that there may be cases in which "the State's participation in a decision [to adopt the challenged restraint] is so dominant that it is unfair to hold a private party responsible for his conduct in implementing it." *Ante*, at 594–595. I agree that a defense based on fairness may be available. I would not, however, rule it out in this case, as the Court's opinion does. The parties, like the court below, so far have addressed themselves only to the question whether petitioner's suit is completely barred by *Parker* v. *Brown* and the Michigan Public Service Commission's approval of the challenged tie-in. I would confine our present decision to that question alone, leaving consideration of a fairness defense to the lower courts on remand, and making only these two further observations:

First, I take it that a defense based on fairness would be a defense to a damages recovery but not injunctive relief. The latter, of course, presents no danger of unfairness. Moreover, as MR. JUSTICE STEVENS implies by his emphasis on not unfairly holding a

mission, may be held liable for treble damages under the Sherman Act for engaging in conduct which, under the requirements of its tariff, it is obligated to perform. I respectfully dissent from this unprecedented application of the federal antitrust laws, which will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of "the prospect of massive treble damage liabilities" [1] payable ultimately by the companies' customers.

The starting point in analyzing this case is *Parker* v. *Brown*, 317 U. S. 341. While *Parker* did not create the "so-called state-action exemption" [2] from the federal antitrust laws,[3] it is the case that is most frequently

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private party "responsible," the defense rests on the theory, not that the challenged restraint is legal, but that since the defendant has committed no voluntary act in implementing it, he cannot be said to have violated any law. The same would not be true of acts following a judgment that the restraint is in fact illegal, and the state law to that extent invalid.

Second, I would hope that consideration will be given on remand to allowing a defense against damages wherever the conduct on which such damages would be based was required by state law. Such a rule would comport with the theory that a defendant should not be held "responsible" in damages for conduct as to which he had no choice, by which I do not mean to rule out other possible grounds for such a rule. See Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N. Y. U. L. Rev. 693, 728–732 (1974). It would also eliminate what seems to me the extremely unfair possibility that during a particular period—and it could be a regulatory lag during which the regulatee was attempting to *change* the state mandate—the regulatee could be required by state law to conform to a course of conduct for which he was all the while accumulating treble-damages liability under federal law.

[1] Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N. Y. U. L. Rev. 693, 728 (1974).

[2] *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788.

[3] The progenitor of that doctrine in this Court was *Olsen* v. *Smith*, 195 U. S. 332, a decision relied on by *Parker* to support the

cited for the proposition that the "[Sherman] Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788. The plurality opinion would hold that that case decided only that "the sovereign State itself," *ante*, at 591, could not be sued under the Sherman Act. This view of *Parker*, which would trivialize that case to the point of overruling it,[4] flies in the face of the decisions of

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proposition that when a State, acting as sovereign, imposes a restraint on commerce, that restraint does not violate the Sherman Act. *Parker* v. *Brown*, 317 U. S., at 352. *Olsen* involved a challenge to the validity of a Texas law fixing the charges of pilots operating in the port of Galveston and prohibiting all but duly commissioned pilots from engaging in the pilotage business. The Court rejected the argument that the Texas pilotage statutes were "repugnant . . . to the laws of Congress forbidding combinations in restraint of trade or commerce," 195 U. S., at 339:

"The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises." *Id.*, at 344–345.

[4] If *Parker* v. *Brown*, *supra*, could be circumvented by the simple expedient of suing the private party against whom the State's "anticompetitive" command runs, then that holding would become an

this Court that have interpreted or applied *Parker*'s "state action" doctrine, and is unsupported by the sources on which the plurality relies.

As to those sources, I would have thought that except in rare instances an analysis of the positions taken by the parties in briefs submitted to this Court should play no role in interpreting its written opinions.[5] A

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empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties.

MR. JUSTICE BLACKMUN in a separate opinion today states that he sees "no reason to disapprove the holding of *Parker*" *ante*, at 613 n. 5, but then proceeds to do precisely that. The holding in *Parker* was that "[t]he state in adopting and enforcing the prorate program . . . imposed [a] restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U. S., at 352. MR. JUSTICE BLACKMUN's position is that the Sherman Act *does* prohibit all state-imposed restraints which do not satisfy the Sherman Act's "rule of reason"—a view quite different from the holding in *Parker*. The fact that the *result* in *Parker* could have been reached by a different route—by a holding, for instance, that the prorate restraint was "reasonable" within the meaning of the Sherman Act or was impliedly exempted by the Agricultural Marketing Agreement Act of 1937—is simply irrelevant.

I am puzzled by MR. JUSTICE BLACKMUN's willingness to emasculate *Parker*, which the Court indicated to have continued vitality just this Term. See *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 770. It seems to me that such a step is inconsistent not only with the legislative history of the Sherman Act but also with well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 n. 14. If those principles preclude the reconsideration of an antitrust exemption which is in every sense an "aberration" and an "anomaly," *Flood* v. *Kuhn*, 407 U. S. 258, 282, then *a fortiori* they preclude the re-examination of an exemption that coincides with a clear expression of congressional intent.

[5] A different approach is, of course, called for in interpreting this Court's summary dispositions of appeals. See generally *Hicks* v. *Miranda*, 422 U. S. 332, 345 n. 14; *Port Authority Bondholders*

contrary rule would permit the "plain meaning" of our decisions to be qualified or even overridden by their "legislative history"—*i. e.*, briefs submitted by the contending parties. The legislative history of congressional enactments is useful in discerning legislative intent, because that history emanates from the same source as the legislation itself and is thus directly probative of the intent of the draftsmen. The conflicting views presented in the adversary briefs and arguments submitted to this Court do not bear an analogous relationship to the Court's final product.

But assuming, *arguendo*, that it is appropriate to look behind the language of *Parker* v. *Brown*, *supra*, I think it is apparent that the plurality has distorted the positions taken by the State of California and the United States as *amici curiae*. The question presented on reargument in *Parker* was "whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act . . . ." *Ante*, at 587 n. 16. This phrasing indicates that the precise issue on which the Court sought reargument was whether the California statute was pre-empted by the Sherman Act, not whether sovereign States were immune from suit under the Sherman Act.

The State of California and the Solicitor General certainly understood this to be the principal issue. As the plurality opinion correctly notes, the supplemental brief filed by the State of California in response to the question posed by this Court advanced three basic arguments. And as it further notes, this Court's decision in *Parker* rested on the first of those arguments. But what the plurality fails to acknowledge is that California's first argument was in principal part a straightforward conten-

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*Protective Comm.* v. *Port of New York Authority*, 387 F. 2d 259, 262 (CA2).

tion that the Sherman Act was not intended to pre-empt state regulation of intrastate commerce.[6]

With respect to the *amicus* brief of the United States,

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[6] California's argument began with a statement of the principle that the Federal Government and the States—"sister sovereignties," Supplemental Brief for Appellants 35 in *Parker* v. *Brown*, O. T. 1942, No. 46—are each "supreme" when legislating "within their respective spheres." "The subject of Federal power is still 'commerce,'—not all commerce, but commerce with foreign nations and among the several states." *Id.*, at 35–37. Incorporating by explicit reference its preceding argument with respect to whether the Federal Agricultural Adjustment Act of 1938 pre-empted the California statute, *id.*, at 38, and proceeding from the premise that the subject matter of the California law was intrastate commerce within the jurisdiction of the State, California contended that "it should never be held that Congress intends to supersede or suspend the exercise of the police powers of the States unless its purpose to effect that result is clearly manifested." *Ibid.* California added that "[s]uch an intent should be even more clear and express when it serves not only to suspend the police powers, but to subject the sovereignty of the State to the inhibition and penalties of Congressional action." *Id.*, at 38–39.

The plurality's position today seems to be that because the State of California placed particular emphasis on the fact that the proscriptions of the Sherman Act, if applicable, would run directly against the State, California's argument in the first part of its brief was simply and solely that "Congress never intended to subject a sovereign State to the provisions of the Sherman Act . . . ." *Ante*, at 588. Yet, as the preceding quotations show, California's argument in the first part of its brief dovetailed two interrelated themes: First, that state regulation of intrastate commerce was not pre-empted by the Sherman Act and, second, that the framers of the Sherman Act did not intend its proscriptions to run directly against the sovereign States. It was the first of these themes that California deemed primary. Near the close of the first part of California's brief appeared the following passage:

"To hold the State within the prohibition of the Sherman Act in the present instance would result in prohibiting it from exercising its otherwise valid police powers. This Court has repeatedly and emphatically stated that 'it should never be held that Congress

the plurality opinion states that the "Solicitor General did not take issue with the appellants' first argument." *Ante,* at 588. Indeed, the plurality says, the Solicitor General "expressly disclaimed any argument that the State of California or its officials had violated federal law." *Ibid.* In support of this assertion, the plurality opinion quotes the following language from p. 59 of the Solicitor General's brief in *Parker:*

> "'[T]he question we face here is not whether California or its officials have violated the Sherman Act, but whether the state program interferes with the accomplishment of the objectives of the federal statute.'" *Ante,* at 589 n. 19.

This statement by the Solicitor General was indeed correct, because the question on which the Court had requested supplemental briefing was "whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act," not "whether California or its officials have violated the Sherman Act. . . ." As the Solicitor General noted in the very next sentence, "[a] state law may be superseded as conflicting with a federal statute irrespective of whether its administrators are subject to prosecution for violation of the paramount federal enactment." [7] The Solicitor General then pro-

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intends to supersede or by its legislation suspend the exercise of the police powers of the State, even when it may do so, unless its purpose to effect that result is clearly manifested.'" Supplemental Brief for Appellants 47–48 in *Parker* v. *Brown,* O. T. 1942, No. 46 (footnote omitted).

[7] This distinction was properly drawn, as is apparent from decisions in the labor law context. A State or political subdivision thereof is not normally subject to the prohibitions of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* See, *e. g., NLRB* v. *Natural Gas Utility Dist.,* 402 U. S. 600. But it certainly does not follow that sovereign enactments of the State may not be deemed pre-empted by the federal legislation. *San*

ceeded to take strenuous issue with the principal contention advanced in the first part of the relevant section of California's brief—that the framers of the federal legislation had not intended to pre-empt state legislation like the California Agricultural Prorate Act.[8]

Thus, it is clear that the plurality has misread the positions taken by the State of California and the Solicitor General in *Parker* v. *Brown*. The question presented to the Court in *Parker* was whether the restraint on trade effected by the California statute was exempt

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*Diego Unions* v. *Garmon*, 359 U. S. 236; *Garner* v. *Teamsters*, 346 U. S. 485.

[8] The Solicitor General began his analysis with the following statement:

"A state statute permitting, or requiring, dealers in a commodity to combine so as to limit the supply or raise the price of a subject of interstate commerce would clearly be void. The question here is whether a state may itself undertake to control the supply and price of a commodity shipped in interstate commerce or otherwise restrain interstate competition through a mandatory regulation." Brief for United States as *Amicus Curiae* 63 in *Parker* v. *Brown*, O. T. 1942, No. 46.

He then acknowledged that "[i]t seems clear that Congress, when it enacted the statute, did not intend to deprive the states of their normal 'police' powers over business and industry. . . . For example, in the field of public utilities, a state can undoubtedly regulate rates without running afoul of the Sherman Act notwithstanding the fact that the rate regulation may embrace interstate commerce." *Id.*, at 63–64 (footnotes and citations omitted). But, the Solicitor General continued, "[a]lthough Congress plainly did not regard local laws in these fields as incompatible with the Sherman Act, we believe that the same cannot be said when the state statute is *designed* directly to control the competitive aspects of an industry in a manner which will have more than local effect." *Id.*, at 64–65. This was the critical portion of the Solicitor General's argument, which sought to draw a delicate distinction between acceptable police power legislation, such as public utility regulation, and pre-empted police power legislation, such as that designed explicitly to suppress competition affecting interstate commerce.

from the operation of the Sherman Act. That was the question addressed by the Solicitor General and, in principal part, by the State of California. And it was the question resolved by this Court in its holding that "[t]he state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U. S., at 352.

The notion that *Parker* decided only that "action taken by state officials pursuant to express legislative command did not violate the Sherman Act," *ante*, at 589, and that that "narrow holding . . . avoided any question about the applicability of the antitrust laws to private action" taken under command of state law, *ante*, at 590, is thus refuted by the very sources on which the plurality opinion relies. That narrow view of the *Parker* decision is also refuted by the subsequent cases in this Court that have interpreted and applied the *Parker* doctrine.

In *Eastern R. Conf.* v. *Noerr Motors*, 365 U. S. 127, for instance, the Court held that no violation of the Sherman Act could be predicated on the attempt by private persons to influence the passage or enforcement of state laws regulating competition in the trucking industry.[9] The Court took as its starting point the ruling in *Parker* v. *Brown* that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U. S., at 136. The Court

[9] The only exception is where the attempt to influence state regulation is a "sham" aimed at "harass[ing] and deter[ring] . . . competitors from having 'free and unlimited access' to the agencies and courts . . . ." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 515.

viewed it as "equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly." *Ibid.* A contrary ruling, the Court held, "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Id.*, at 137. Surely, if a rule permitting Sherman Act liability to arise from lobbying by private parties for state rules restricting competition would impair the power of state governments to impose restraints, then *a fortiori* a rule permitting Sherman Act liability to arise from private parties' compliance with such rules would impair the exercise of the States' power. But as the Court in *Noerr* correctly noted, the latter result was foreclosed by *Parker*'s holding that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U. S., at 136.

Litigation testing the limits of the state-action exemption has focused on whether alleged anticompetitive conduct by private parties is indeed "the result of" state action. Thus, in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, the question was whether price fixing practiced by the respondents was "required by the State acting as sovereign. *Parker* v. *Brown,* 317 U. S., at 350–352 . . . ." *Id.*, at 790. The Court held that the "so-called state-action exemption," *id.*, at 788, did not protect the respondents because it "cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. . . . Respondents' arguments, at most, constitute the contention that their activities complemented the ob-

jective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.*, at 790–791. The plurality's view that *Parker* does not cover state-compelled private conduct flies in the face of this carefully drafted language in the *Goldfarb* opinion.

*Parker, Noerr,* and *Goldfarb* point unerringly to the proper disposition of this case. The regulatory process at issue has three principal stages. First, the utility company proposes a tariff. Second, the Michigan Public Service Commission investigates the proposed tariff and either approves it or rejects it. Third, if the tariff is approved, the utility company must, under command of state law, provide service in accord with its requirements until or unless the Commission approves a modification. The utility company thus engages in two distinct activities: It proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under *Noerr* and the second—compliance with the terms of the tariff under the command of state law—is immune from antitrust liability under *Parker* and *Goldfarb*.[10]

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[10] The Court's reliance on *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, is misplaced. There the Court held that a utility's discontinuance of service to a customer for nonpayment of bills was not "state action" sufficient to trigger the protections of the Due Process Clause of the Fourteenth Amendment. The petitioner had argued that because the State Public Utility Commission had approved that practice as a part of the respondent's general tariff, the termination was "state action" for Fourteenth Amendment purposes. *Id.*, at 354. The Court disagreed, holding as follows: "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory

The plurality's contrary view would effectively overrule not only *Parker* but the entire body of post-*Parker* case law in this area, including *Noerr*. With the *Parker* holding reduced to the trivial proposition that the Sherman Act was not intended to run directly against state officials or governmental entities, the Court would fashion a new two-part test for determining whether state utility regulation creates immunity from the federal antitrust law. The first part of the test would focus on whether subjecting state-regulated utilities to antitrust liability would be "unjust." The second part of the test would look to whether the draftsmen of the Sherman Act intended to "superimpose" antitrust standards, and thus exposure to treble damages, on conduct compelled by state regulatory laws. THE CHIEF JUSTICE accedes to the new two-part test, at least where the State "purports, without any independent regulatory purpose, to control [a] utility's activities in separate, competitive

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scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Id.*, at 357 (footnote omitted).

This constitutional holding has no bearing on whether a utility's action in compliance with a tariff which it proposed is exempt from Sherman Act liability. The latter is a question of legislative intent, not constitutional law, and must be answered on the basis of a separate line of authority—namely, decisions such as *Parker* and *Noerr* which have construed the Sherman Act.

markets." *Ante*, at 604. The new immunity test thus has the approval of a majority of the Court in instances where state-compelled anticompetitive practices are deemed "ancillary" to the State's regulatory goals.[11]

With scarcely a backward glance at the *Noerr* case, the Court concludes that because the utility company's "participation" in the decision to incorporate the lamp-exchange program into the tariff was "sufficiently significant," there is nothing "unjust" in concluding that the company is required to conform its conduct to federal antitrust law "like comparable conduct by unregulated businesses . . . ." *Ante*, at 594. This attempt to distinguish between the exemptive force of mandatory state rules adopted at the behest of private parties and those adopted pursuant to the State's unilateral decision is flatly inconsistent with the rationale of *Noerr*. There the Court pointedly rejected "[a] construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested" because such a construction "would . . . deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." 365 U. S., at 139.[12]

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[11] I disagree with THE CHIEF JUSTICE's conclusion that Michigan's policy is "neutral" with respect to whether a utility should have a lamp-exchange program. See n. 26, *infra*. Moreover, I think it is apparent that insistence on statutory articulation of a state "purpose" to regulate activities performed incident to the provision of a "natural monopoly" service will lead to serious interference with state regulation. See *ibid.*

[12] As the Court noted in *Noerr*, the scheme at issue in *Parker* required popular initiative. 365 U. S., at 137–138, n. 17. And as it further noted, *Parker* itself expressly rejected the argument that the necessity for private initiative affected the "program's validity under the Sherman Act . . . ." *Id.*, at 137.

Today's holding will not only penalize the right to petition but may very well strike a crippling blow at state utility regulation. As the Court seems to acknowledge, such regulation is heavily dependent on the active participation of the regulated parties, who typically propose tariffs which are either adopted, rejected, or modified by utility commissions. But if a utility can escape the unpredictable consequences of the second arm of the Court's new test, see *infra,* this page, only by playing possum—by exercising no "option" in the Court's terminology, *ante,* at 594—then it will surely be tempted to do just that, posing a serious threat to efficient and effective regulation.

The second arm of the Court's new immunity test, which apparently comes into play only if the utility's own activity does not exceed a vaguely defined threshold of "sufficient freedom of choice," purports to be aimed at answering the basic question of whether "Congress intended to superimpose antitrust standards on conduct already being regulated" by state utility regulation laws. *Ante,* at 595. Yet analysis of the Court's opinion reveals that the three factors to which the Court pays heed have little or nothing to do with discerning congressional intent. Rather, the second arm of the new test simply creates a vehicle for ad hoc judicial determinations of the substantive validity of state regulatory goals, which closely resembles the discarded doctrine of substantive due process. See *Ferguson* v. *Skrupa,* 372 U. S. 726.

The Court's delineation of the second arm of the new test proceeds as follows. Apart from the "fairness" question, the Court states, there are "at least three reasons" why the light-bulb program should not enjoy Sherman Act immunity. *Ante,* at 595. "First," the Court observes, "merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy

inconsistent standards . . . ." *Ibid.* That is true enough as an abstract proposition, but the very question is whether the utility's alleged "tie" of light-bulb sales to the provision of electric service is immune from antitrust liability, assuming it would constitute an antitrust violation in the absence of regulation.[13] Second, the Court states, "even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's . . . ." *Ibid.* The Court goes on to amplify this rationale as follows:

> "The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. Therefore,

[13] The Court seems to indicate at one point that it would be improper to "superimpose" antitrust liability on state regulatory schemes aimed at *suppressing* competition and *raising* prices. See *ante*, at 595 ("Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker*, were of that character"). But some state regulation, the Court continues, aims not at suppressing competition, but rather at duplicating the effects of competition—*i. e.*, keeping prices down. With respect to state regulation of the latter type, the state scheme will not afford an exemption to the extent the regulated party is engaged in "business activity in competitive areas of the economy." *Ante*, at 596 (footnote omitted).

This rationale will not bear its own weight. If compliance with a state program aimed at *suppressing* competition in nonmonopoly industries—*i. e.*, raisin production—cannot give rise to Sherman Act liability, then surely compliance with a state program aimed at controlling the terms and conditions of service performed incident to the provision of a "natural monopoly" product cannot give rise to treble damages.

> assuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.
>
> "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.'
>
> "The application of that standard to this case inexorably requires rejection of respondent's claim." *Ante*, at 596–598 (footnotes omitted).

The Court's analysis rests on a mistaken premise. The "implied immunity" doctrine employed by this Court to reconcile the federal antitrust laws and federal regulatory statutes cannot, rationally, be put to the use for which the Court would employ it. That doctrine, a species of the basic rule that repeals by implication are disfavored, comes into play only when two arguably inconsistent *federal* statutes are involved. " 'Implied repeal' " of federal antitrust laws by inconsistent state regulatory statutes is not only " 'not favored,' " *ante*, at 597–598, n. 37, it is impossible. See U. S. Const., Art. VI, cl. 2.

A closer scrutiny of the Court's holding reveals that its reference to the inapposite "implied repeal" doctrine is simply window dressing for a type of judicial review radically different from that engaged in by this Court in *Gordon* v. *New York Stock Exchange*, 422 U. S. 659, and *United States* v. *Philadelphia National Bank*, 374 U. S. 321. Those cases turned exclusively on issues of statutory construction and involved no judicial scrutiny of the abstract "necessity" or "centrality" of par-

ticular regulatory provisions. Instead, the federal regulatory statute was accepted as a given, as was the federal antitrust law. The Court's interpretative effort was aimed at accommodating these arguably inconsistent bodies of law, not at second-guessing legislative judgments concerning the "necessity" for including particular provisions in the regulatory statute.

The Court's approach here is qualitatively different. The State of Michigan, through its Public Service Commission, has decided that requiring Detroit Edison to provide "free" light bulbs as a term and condition of service is in the public interest. Yet the Court is prepared to set aside that policy determination: "The lamp-supply program is by no means . . . *imperative* in the continued effective functioning of Michigan's regulation of the utilities industry." *Ante*, at 597 n. 36 (emphasis added). Even "if the federal antitrust laws should be construed to outlaw respondent's light-bulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to *function effectively*. Regardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be *almost entirely unimpaired*." *Ante*, at 598 (emphasis added).

The emphasized language in these passages shows that the Court is adopting an interpretation of the Sherman Act which will allow the federal judiciary to substitute its judgment for that of state legislatures and administrative agencies with respect to whether particular anticompetitive regulatory provisions are " 'sufficiently central,' " *ante*, at 597 n. 37, to a judicial conception of the proper scope of state utility regulation. The content of those " 'purposes,' " *ibid.*, which the Court will suffer the States to promote derives presumably from the mandate of the Sherman Act. On this assumption—and no other is plausible—it becomes appar-

ent that the Court's second reason for extending the Sherman Act to cover the light-bulb program, when divested of inapposite references to the federal implied repeal doctrine, is merely a restatement of the third rationale, which the Court phrases as follows: "[F]inally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs." *Ante,* at 595. This statement raises at last the only legitimate question, which is whether *Parker* erred in holding that Congress, in enacting the Sherman Act, did not intend to vitiate state regulation of the sort at issue here by creating treble-damages exposure for activities performed in compliance therewith.

The Court's rationale appears to be that the draftsmen of the Sherman Act intended to exempt state-regulated utilities from treble damages only to the extent those utilities are complying with state rules which narrowly reflect the "typica[l] assum[ption] that the [utility] is a natural monopoly" and which regulate the utility's "natural monopoly powers" as opposed to its "business activity in competitive areas of the economy." *Ante,* at 595–596 (footnotes omitted). Furthermore, such regulation must be " 'sufficiently central' " to the regulation of natural monopoly powers if it is to shield the regulated party from antitrust liability. *Ante,* at 597 n. 37. This Delphic reading of the Sherman Act, which is unaided by any reference to the language or legislative history of that Act, is, of course, inconsistent with *Parker* v. *Brown*. *Parker* involved a state scheme aimed at artificially raising the market price of raisins. Raisin production is not a "natural monopoly." If the limits of

the state-action exemption from the Sherman Act are congruent with the boundaries of "natural monopoly" power, then *Parker* was wrongly decided.

But the legislative history of the Sherman Act shows conclusively that *Parker* was correctly decided. The floor debates and the House Report on the proposed legislation clearly reveal, as at least one commentator has noted, that "Congress fully understood the narrow scope given to the commerce clause" in 1890.[14] This understanding is, in many ways, of historic interest only, because subsequent decisions of this Court have "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power." [15] But the narrow view taken by the Members of Congress in 1890 remains relevant for the limited purpose of assessing their intention regarding the interaction of the Sherman Act and state economic regulation.

The legislative history reveals very clearly that Congress' perception of the limitations of its power under the Commerce Clause was coupled with an intent not to intrude upon the authority of the several States to regulate "domestic" commerce. As the House Report stated:

> "It will be observed that the provisions of the bill are carefully confined to such subjects of legislation as are clearly within the legislative authority of Congress.
>
> "*No attempt is made to invade the legislative au-*

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[14] Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Nw. U. L. Rev. 71, 84 (1974). See, *e. g.*, 20 Cong. Rec. 1169 (1889) (remarks of Sen. Reagan); *id.*, at 1458 (remarks of Sen. George); 21 Cong. Rec. 2467 (1890) (remarks of Sen. Hiscock); *id.*, at 2469–2470 (remarks of Sen. Reagan); *id.*, at 2566 (remarks of Sen. Stewart); *id.*, at 2567 (remarks of Sen. Hoar); *id.*, at 2600 (remarks of Sen. George).

[15] *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 743 n. 2.

> *thority of the several States or even to occupy doubtful grounds.* No system of laws can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations.
>
> "It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority." [16]

Similarly, the floor debates on the proposed legislation reveal an intent to "g[o] as far as the Constitution permits Congress to go," [17] in the words of Senator Sherman, conjoined with an intent not to "interfere with" state-law efforts to "prevent *and control* combinations within the limit of the State." [18] Far from demonstrating an intent to pre-empt state laws aimed at preventing or controlling combinations or monopolies, the legislative debates show that Congress' goal was to supplement such state efforts, themselves restricted to the geographic boundaries of the several States. As Senator Sherman stated: "Each State can deal with a combination within the State, but only the General Government can deal

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[16] H. R. Rep. No. 1707, 51st Cong., 1st Sess., 1 (1890) (emphasis added).

[17] 20 Cong. Rec. 1167 (1889).

[18] 21 Cong. Rec. 2456 (1890) (emphasis added).

with combinations reaching not only the several States, but the commercial world. This bill does not include combinations within a State . . . ." [19] Indeed a pre-existing body of state law forbidding combinations in restraint of trade provided the model for the federal Act. As Senator Sherman stated with respect to the proposed legislation: "It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now, by common or statute law, null and void." [20]

It is noteworthy that the body of state jurisprudence which formed the model for the Sherman Act coexisted with state laws permitting regulated industries to operate under governmental control in the public interest. Indeed, state regulatory laws long antedated the passage of the Sherman Act and had, prior to its passage, been upheld by this Court against constitutional attack.[21] Such laws were an integral part of state efforts to regu-

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[19] *Id.*, at 2460.

[20] *Id.*, at 2456.

[21] See *Munn* v. *Illinois*, 94 U. S. 113, 125 ("Under [the police] powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property").

late competition to which Congress turned for guidance in barring restraints of interstate commerce, and it is clear that those laws were left undisturbed by the passage of the Sherman Act in 1890. For, as congressional spokesmen expressly stated, there was no intent to "interfere with" state laws regulating domestic commerce or "invade the legislative authority of the several States. . . ."

As previously noted, the intent of the draftsmen of the Sherman Act not to intrude on the sovereignty of the States was coupled with a full and precise understanding of the narrow scope of congressional power under the Commerce Clause, as it was then interpreted by decisions of this Court. Subsequent decisions of the Court, however, have permitted the "jurisdictional" reach of the Sherman Act to expand along with an expanding view of the commerce power of Congress. See *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 743 n. 2, and cases cited therein. These decisions, based on a determination that Congress intended to exercise all the power it possessed when it enacted the Sherman Act,[22] have in effect allowed the Congress of 1890 the retroactive benefit of an enlarged judicial conception of the commerce power.[23]

It was this retroactive expansion of the jurisdictional reach of the Sherman Act that was in large part responsible for the advent of the *Parker* doctrine. *Parker* involved a program regulating the production of raisins

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[22] *E. g., United States* v. *Frankfort Distilleries*, 324 U. S. 293, 298; *United States* v. *Underwriters Assn.*, 322 U. S. 533, 558; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435. See also *United States* v. *American Bldg. Maint. Industries*, 422 U. S. 271, 278; *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 194–195.

[23] See *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S., at 743 n. 2; *Gulf Oil Corp.* v. *Copp Paving Co., supra*, at 201–202; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 229–235.

within the State of California. Under the original understanding of the draftsmen of the Sherman Act, such in-state production, like in-state manufacturing, would not have been subject to the regulatory power of Congress under the Commerce Clause and thus not within the "jurisdictional" reach of the Sherman Act. See *United States* v. *E. C. Knight Co.*, 156 U. S. 1. If the state of the law had remained static, the *Parker* problem would rarely, if ever, have arisen. As stated in *Northern Securities Co.* v. *United States*, 193 U. S. 197, the operative premise would have been that the "Anti-Trust Act . . . prescribe[d] . . . a *rule* for *interstate and international* commerce, (not for domestic commerce,)" *id.*, at 337. The relevant question would have been whether the anticompetitive conduct required or permitted by the state statute was in restraint of domestic or interstate commerce. If the former, the conduct would have been beyond the reach of the Sherman Act; if the latter, the conduct would probably have violated the Sherman Act, regardless of contrary state law, on the theory that "[n]o State can, by . . . any . . . mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or . . . to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce." *Id.*, at 345–346.

But the law did not remain static. As one commentator has put it: "By 1942, when *Parker v. Brown* was decided, the interpretation and scope of the commerce clause had changed substantially. With the development of the 'affection doctrine' purely intrastate events"—like state-mandated anticompetitive arrangements with respect to in-state agricultural production or in-state provision of utility services—"could be regulated

under the commerce clause if these events had the requisite impact on interstate commerce." [24] This development created a potential for serious conflict between state statutes regulating commerce which, in 1890, would have been considered "domestic" but which, in 1942, were viewed as falling within the jurisdictional reach of the Sherman Act. To have held that state statutes requiring anticompetitive arrangements with respect to such commerce were pre-empted by the Sherman Act would, in effect, have transformed a generous principle of judicial construction—namely the "retroactive" expansion of the jurisdictional reach of the Sherman Act to the limits of an expanded judicial conception of the commerce power—into a transgression of the clearly expressed congressional intent not to intrude on the regulatory authority of the States.

The "state action" doctrine of *Parker* v. *Brown,* as clarified by *Goldfarb,* represents the best possible accommodation of this limiting intent and the post-1890 judicial expansion of the jurisdictional reach of the Sherman Act. *Parker*'s basic holding—that the Sherman Act did not intend to displace restraints imposed by the State acting as sovereign—coincides with the expressed legislative goal not to "invade the legislative authority of the several States . . . ." *Goldfarb* clarified *Parker* by holding that private conduct, if it is to come within the state-action exemption, must be not merely "prompted" but "compelled" by state action. Thus refined, the doctrine performs the salutary function of isolating those areas of state regulation where the State's sovereign interest is, by the State's own judgment, at its strongest, and limits the exemption to those areas.[25]

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[24] Slater, *supra,* n. 14, at 85.

[25] MR. JUSTICE BLACKMUN expresses the view that the Court answered the question of "what was to be the result if the expanding

Beyond this the Court cannot go without disregarding the purpose of the Sherman Act not to disrupt state regulatory laws.[26] Congress, of course, can alter its

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ambit of the Sherman Act should bring it into conflict with inconsistent state law" in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, and that the answer it gave was that *any* state regulatory statute "inconsistent" with the judicially expanded Sherman Act was pre-empted. *Ante*, at 606. But the opinion in *Schwegmann*—which did not purport to modify or overrule *Parker*—is most plausibly read as resting on a post-1890 expression of congressional intent, the Miller-Tydings Act. See *infra*, at 639. Even assuming, however, that *Schwegmann* conflicted with *Parker*, then surely the most significant aspect of that conflict is that Congress did not allow it to persist, as *Schwegmann* was soon legislatively overruled by the enactment of the McGuire bill, 66 Stat. 632, 15 U. S. C. §§ 45 (a) (2)–(5).

[26] The Court states at one point that the omission of a "direct reference to light bulbs" in the statute creating the Michigan Public Service Commission indicates that the State's policy is "neutral on the question whether a utility should, or should not, have such a program." *Ante*, at 584, 585. This statement seems to suggest that the Court considers the specificity with which a state legislature deals with particular regulatory matters to be relevant in determining whether agency action respecting such matters represents a sovereign choice, entitled to deference under the Sherman Act.

This suggestion overlooks the fact that Michigan's policy, far from being "neutral," is, as announced in Mich. Comp. Laws § 460.6 (1970), to vest an expert agency "with complete power and jurisdiction to regulate all public utilities in the state . . . ." That agency is "vested with power and jurisdiction to regulate all rates, fares, fees, charges, *services*, rules, *conditions of service* and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies . . . ." *Ibid.* (emphasis added).

If a state legislature can ensure antitrust exemption only by eschewing such broad delegation of regulatory authority and incorporating regulatory details into statutory law, then there is a very great risk that the State will be prevented from regulating

original intent and expand or contract the categories of state law which may permissibly impose restraints on competition. For example, in 1937 Congress passed the Miller-Tydings Act which attached a proviso to § 1 of the Sherman Act permitting resale price maintenance contracts where such contracts were permitted by applicable state law. This proviso was interpreted in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, not to permit a State to enforce a law providing that *all* retailers within a State were bound by a resale price maintenance contract executed by any one retailer in the State. As the Court today notes, *Parker*—and the legislative judgment embodied in the 1890 version of the Sherman Act—would, standing alone, have seemed to immunize the state scheme. *Ante*, at 593. But Congress was thought to have struck a new balance in 1937 with respect to a specific category of state-imposed restraints. Accordingly, the Court in *Schwegmann* determined congressional intent concerning the permissible limits of state restraints with respect to resale price maintenance by reference to the later, and more specific, expression of congressional purpose.[27]

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effectively. For as this Court has repeatedly observed in another context, "[d]elegation . . . has long been recognized as necessary in order that the exertion of legislative power does not become a futility. . . . [T]he effectiveness of both the legislative and administrative processes would become endangered if [the legislature] were under the . . . compulsion of filling in the details beyond the liberal prescription [of requiring the making of 'just and reasonable' rates and regulating in the 'public interest'] here. Then the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398.

[27] The decision in *Schwegmann* rested primarily on a detailed analysis of the legislative history of the Miller-Tydings Act. 341 U. S., at 390–395.

There has been no analogous alteration of the original intent regarding the area of state regulation at issue here. Indeed, to the extent subsequent congressional action is probative at all, it shows a continuing intent to defer to the regulatory authority of the States over the terms and conditions of in-state electric utility service. Thus, § 201 (a) of the Federal Power Act, 16 U. S. C. § 824 (a), provides in relevant part that "Federal regulation . . . [is] to extend only to those matters which are not subject to regulation by the States."

The Court's opinion simply ignores the clear evidence of congressional intent and substitutes its own policy judgment about the desirability of disregarding any facet of state economic regulation that it thinks unwise or of no great importance. In adopting this freewheeling approach to the language of the Sherman Act the Court creates a statutory simulacrum of the substantive due process doctrine I thought had been put to rest long ago. See *Ferguson* v. *Skrupa*, 372 U. S. 726.[28] For the Court's approach contemplates the selective interdiction of those anticompetitive state regulatory measures that are deemed not "central" to the limited range of regulatory goals considered "imperative" by the federal judiciary.

Henceforth, a state-regulated public utility company must at its peril successfully divine which of its countless and interrelated tariff provisions a federal court will ultimately consider "central" or "imperative." If it guesses wrong, it may be subjected to treble damages as a penalty for its compliance with state law.

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[28] See Verkuil, State Action, Due Process and Antitrust: Reflections on *Parker* v. *Brown*, 75 Col. L. Rev. 328 (1975).

## Reporter's Note

The next page is purposely numbered 901. The numbers between 640 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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JULY 6, 1976

*Order Appointing Marshal*

It is ordered by the Court that Alfred Wong be, and he is hereby, appointed Marshal of this Court, effective July 1, 1976.

*Affirmed on Appeal*

No. 74–1623. SLONE ET AL. *v.* DESKINS BRANCH COAL CO. ET AL. Appeal from D. C. E. D. Ky. affirmed.

No. 75–713. GERSTEIN ET AL. *v.* COE ET AL. Affirmed on appeal from C. A. 5th Cir. *Planned Parenthood of Central Missouri* v. *Danforth, ante,* p. 52. Reported below: 517 F. 2d 787.

No. 75–772. FRANKLIN ET AL. *v.* FITZPATRICK, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, ET AL. Affirmed on appeal from D. C. E. D. Pa. *Planned Parenthood of Central Missouri* v. *Danforth, ante,* p. 52. Reported below: 401 F. Supp. 554.

*Vacated and Remanded on Appeal*

No. 75–709. BEAL, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. *v.* FRANKLIN ET AL. Appeal from D. C. E. D. Pa. Judgment vacated and case remanded for further consideration in light of *Planned Parenthood of Central Missouri* v. *Danforth, ante,* p. 52, *Singleton* v. *Wulff, ante,* p. 106, and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748. MR. JUSTICE STEWART and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 401 F. Supp. 554.

*Certiorari Granted—Vacated and Remanded*

In the following cases (No. 73–6853 through No. 75–5384) petitioners were sentenced to death. Imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Woodson* v. *North Carolina, ante,* p. 280. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalty imposed, and cases remanded to the Supreme Court of North Carolina for further proceedings. See N. C. Laws 1975 (1st Sess.) c. 749.

No. 73–6853. HENDERSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 285 N. C. 1, 203 S. E. 2d 10;

No. 73–6876. NOELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 284 N. C. 670, 202 S. E. 2d 750;

No. 74–6735. STEGMANN *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 286 N. C. 638, 213 S. E. 2d 262;

No. 75–5032. LOWERY *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 286 N. C. 698, 213 S. E. 2d 255;

No. 75–5076. ARMSTRONG *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 287 N. C. 60, 212 S. E. 2d 894; and

No. 75–5384. VINSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 287 N. C. 326, 215 S. E. 2d 60.

In the following cases (beginning with No. 73–6875 on p. 903 and extending through No. 75–6686 on p. 904) petitioners were sentenced to death. Imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Woodson* v. *North Carolina, ante,* p. 280. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the

death penalty imposed, and cases remanded to the Supreme Court of North Carolina for further proceedings.

No. 73–6875. DILLARD *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 285 N. C. 72, 203 S. E. 2d 6;

No. 73–6877. JARRETTE *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 284 N. C. 625, 202 S. E. 2d 721;

No. 73–6878. CROWDER *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 285 N. C. 42, 203 S. E. 2d 38;

No. 73–7032. HONEYCUTT *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 285 N. C. 174, 203 S. E. 2d 844;

No. 74–6263. WARD *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 286 N. C. 304, 210 S. E. 2d 407;

No. 74–6733. GORDON *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 287 N. C. 118, 213 S. E. 2d 708;

No. 75–5077. MCLAUGHLIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 286 N. C. 597, 213 S. E. 2d 238;

No. 75–5091. WOODS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 286 N. C. 612, 213 S. E. 2d 214;

No. 75–5262. SIMMONS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 286 N. C. 681, 213 S. E. 2d 280;

No. 75–5281. YOUNG *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 287 N. C. 377, 214 S. E. 2d 763;

No. 75–5426. ROBBINS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 287 N. C. 483, 214 S. E. 2d 756;

No. 75–5728. BOCK *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 288 N. C. 145, 217 S. E. 2d 513;

No. 75–5792. KING ET AL. *v.* NORTH CAROLINA. Sup.

Ct. N. C. Reported below: 287 N. C. 645, 215 S. E. 2d 540;

No. 75–5949. AVERY *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 286 N. C. 459, 212 S. E. 2d 142;

No. 75–5960. CAREY *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 288 N. C. 254, 218 S. E. 2d 387;

No. 75–6143. MITCHELL ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 288 N. C. 360, 218 S. E. 2d 332;

No. 75–6145. GRIFFIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 288 N. C. 437, 219 S. E. 2d 48;

No. 75–6150. SPAULDING ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 288 N. C. 397, 219 S. E. 2d 178;

No. 75–6151. MCZORN *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 288 N. C. 417, 219 S. E. 2d 201;

No. 75–6168. WADDELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 19, 220 S. E. 2d 293;

No. 75–6378. PATTERSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 288 N. C. 553, 220 S. E. 2d 600;

No. 75–6399. DULL *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 55, 220 S. E. 2d 344;

No. 75–6410. CARTER *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 35, 220 S. E. 2d 313; and

No. 75–6686. HARRILL *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 186, 221 S. E. 2d 325.

No. 73–7031. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Certiorari granted, 419 U. S. 963.*] Petitioner

*[REPORTER'S NOTE: This case was argued on April 21, 1975, and thereafter, by order of June 23, 1975, was restored to the calendar

in this case was sentenced to death. Imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Woodson* v. *North Carolina, ante,* p. 280. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded to the Supreme Court of North Carolina for further proceedings. Reported below: 285 N. C. 90, 203 S. E. 2d 803.

*Anthony G. Amsterdam* argued the cause for petitioner. With him on the brief were *Jack Greenberg, James M. Nabrit III, Adam Stein,* and *Charles L. Bector.*

*Jean A. Benoy,* Deputy Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *Rufus L. Edmisten,* Attorney General.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae.* With him on the brief were *Acting Assistant Attorney General Keeney, Deputy Solicitor General Randolph, Jerome M. Feit,* and *Harvey M. Stone.*

Briefs of *amici curiae* were filed by *Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, and *William E. James,* Assistant Attorney General, for the State of California; by *Vernon B. Romney,* Attorney General, for the State of Utah; by *John J. Abt* for the National Alliance Against Racist and Political Repression; by *Chevene B. King* for the National Conference of Black Lawyers; and by Richard A. Heim.

No. 74–669. SPARKS *v.* NORTH CAROLINA; and

No. 75–5697. WETMORE *v.* NORTH CAROLINA. Sup. Ct. N. C. Petitioners in these cases were sentenced

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for reargument (422 U. S. 1039). On February 23, 1976, the Court issued an order revoking its order of June 23, 1975 (424 U. S. 903).]

to death. Imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Woodson* v. *North Carolina, ante,* p. 280. Motion for leave to proceed *in forma pauperis* in No. 75–5697 granted. Certiorari granted, judgments vacated, and cases remanded to the Supreme Court of North Carolina for further proceedings in light of *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975). MR. JUSTICE BRENNAN would grant certiorari and set cases for oral argument. Reported below: No. 74–669, 285 N. C. 631, 207 S. E. 2d 712; No. 75–5697, 287 N. C. 344, 215 S. E. 2d 51.

No. 74–6065. SELMAN *v.* LOUISIANA;

No. 75–6067. WATTS *v.* LOUISIANA; and

No. 75–6123. WASHINGTON *v.* LOUISIANA. Sup. Ct. La. Petitioners in these cases were sentenced to death. Imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Roberts* v. *Louisiana, ante,* p. 325. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalty imposed, and cases remanded to the Supreme Court of Louisiana for further proceedings. Reported below: No. 74–6065, 300 So. 2d 467; No. 75–6067, 320 So. 2d 146; No. 75–6123, 321 So. 2d 763.

No. 75–647. FOOD HANDLERS LOCAL 425, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, ET AL. *v.* VALMAC INDUSTRIES, INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Buffalo Forge Co.* v. *Steelworkers, ante,* p. 397. Reported below: 519 F. 2d 263.

No. 75–696. LaVallee, Correctional Superintendent *v.* Mungo. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Stone* v. *Powell, ante,* p. 465. Reported below: 522 F. 2d 211.

In the following cases (No. 75–6451 through No. 75–6639) petitioners were sentenced to death. Imposition and carrying out of the death penalty under the law of Oklahoma constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Woodson* v. *North Carolina, ante,* p. 280 and *Roberts* v. *Louisiana, ante,* p. 325. Motions for leave to proceed in *forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalty imposed, and cases remanded for further proceedings. The Chief Justice, Mr. Justice White, and Mr. Justice Rehnquist would grant certiorari, vacate judgments, and remand cases for further consideration in light of *Jurek* v. *Texas, ante,* p. 262; *Roberts* v. *Louisiana, ante,* p. 325; *Woodson* v. *North Carolina, ante,* p. 280; *Gregg* v. *Georgia, ante,* p. 153; and *Proffitt* v. *Florida, ante,* p. 242.

No. 75–6451. Green *v.* Oklahoma. Ct. Crim. App. Okla. Reported below: 542 P. 2d 551;

No. 75–6452. Justus *v.* Oklahoma. Ct. Crim. App. Okla. Reported below: 542 P. 2d 598;

No. 75–6453. Lusty *v.* Oklahoma. Ct. Crim. App. Okla. Reported below: 542 P. 2d 545;

No. 75–6637. Davis *v.* Oklahoma. Ct. Crim. App. Okla. Reported below: 542 P. 2d 532;

No. 75–6638. Rowbotham *v.* Oklahoma. Ct. Crim. App. Okla. Reported below: 542 P. 2d 610; and

No. 75–6639. Williams et al. *v.* Oklahoma. Ct. Crim. App. Okla. Reported below: 542 P. 2d 554.

No. 75–5416. MEEKS *v.* HAVENER, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Doyle* v. *Ohio*, 426 U. S. 610. Reported below: 516 F. 2d 902.

No. 75–5983. THOMPSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Petitioner in this case was sentenced to death. Imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments. *Woodson* v. *North Carolina*, *ante*, p. 280. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and set case for oral argument. Reported below: 287 N. C. 303, 214 S. E. 2d 742.

*Miscellaneous Order*

No. A–1121. GOLDSWER *v.* NEW YORK. Application for stay of execution of judgment of the Court of Appeals of New York, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Reported below: 39 N. Y. 2d 656, 350 N. E. 2d 604.

*Probable Jurisdiction Noted*

No. 75–1440. MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT *v.* ROE ET AL. Appeal from D. C. Conn. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 408 F. Supp. 660.

*Certiorari Granted*

No. 74–6593. GARDNER *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pau-*

*peris* granted. Certiorari granted limited to Question II presented by the petition which reads as follows: "Whether nondisclosure of a 'confidential' portion of a pre-sentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the pre-sentence report?" Reported below: 313 So. 2d 675.

No. 75–442. POELKER, MAYOR OF ST. LOUIS, ET AL. *v.* DOE. C. A. 8th Cir. Motions of James R. Butler et al. and Missouri Doctors for Life for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 515 F. 2d 541 and 527 F. 2d 605.

No. 75–554. BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. *v.* DOE ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 523 F. 2d 611.

*Certiorari Denied*

No. 74–6673. LAMPKINS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 286 N. C. 497, 212 S. E. 2d 106.

No. 75–565. PLAIN DEALER PUBLISHING CO. *v.* CLEVELAND TYPOGRAPHICAL UNION NO. 53 ET AL. C. A.

6th Cir. Certiorari denied. Reported below: 520 F. 2d 1220.

No. 75–524. HYSTER CO. *v.* EMPLOYEES ASSOCIATION OF KEWANEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 89.

No. 75–1402. UNITED STATES *v.* KARATHANOS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 531 F. 2d 26.

No. 75–1562. UNITED STATES STEEL CORP. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1236.

No. 75–5873. PRESCIMONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 971.

In the following cases (No. 74–5196 through No. 75–6653), certiorari was denied:

No. 74–5196. HOUSE *v.* GEORGIA. Sup. Ct. Ga. Reported below: 232 Ga. 140, 205 S. E. 2d 217;

No. 74–6207. ROSS *v.* GEORGIA. Sup. Ct. Ga. Reported below: 233 Ga. 361, 211 S. E. 2d 356;

No. 74–6547. MOORE *v.* GEORGIA. Sup. Ct. Ga. Reported below: 233 Ga. 861, 213 S. E. 2d 829;

No. 74–6557. MCCORQUODALE *v.* GEORGIA. Sup. Ct. Ga. Reported below: 233 Ga. 369; 211 S. E. 2d 577;

No. 74–6736. JARRELL *v.* GEORGIA. Sup. Ct. Ga. Reported below: 234 Ga. 410, 216 S. E. 2d 258;

No. 75–5022. MITCHELL *v.* GEORGIA. Sup. Ct. Ga. Reported below: 234 Ga. 160, 214 S. E. 2d 900;

No. 75–6250. SMITH, AKA MACHETTI *v.* GEORGIA. Sup. Ct. Ga. Reported below: 236 Ga. 12, 222 S. E. 2d 308;

No. 75–6536. MASON *v.* GEORGIA. Sup. Ct. Ga. Reported below: 236 Ga. 46, 222 S. E. 2d 339; and

No. 75–6653. PULLIAM *v.* GEORGIA. Sup. Ct. Ga. Reported below: 236 Ga. 460, 224 S. E. 2d 8.

MR. JUSTICE BRENNAN, dissenting.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 227, the imposition and carrying out of the death penalty in each of these cases [No. 74–5196 through No. 75–6653] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. I would therefore grant certiorari in each of these cases and vacate the judgment in each case insofar as it leaves undisturbed the death sentence imposed.

MR. JUSTICE MARSHALL, dissenting.

Because I consider the death penalty to be a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia, ante,* p. 231 (MARSHALL, J., dissenting), I would grant certiorari in these cases [No. 74–5196 through No. 75–6653] and vacate the judgments insofar as they leave undisturbed the sentences of death.

No. 74–6168. HALLMAN *v.* FLORIDA;
No. 74–6377. SULLIVAN *v.* FLORIDA;
No. 74–6563. SAWYER *v.* FLORIDA; and
No. 75–5209. SPENKELINK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 74–6168, 305 So. 2d 180; No. 74–6377, 303 So. 2d 632; No. 74–6563, 313 So. 2d 680; No. 75–5209, 313 So. 2d 666.

MR. JUSTICE BRENNAN, dissenting.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 227, the imposition and carrying out of the death penalty in each of these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. I would

therefore grant certiorari in each of these cases and vacate the judgment in each case insofar as it leaves undisturbed the death sentence imposed.

MR. JUSTICE MARSHALL, dissenting.

Because I consider the death penalty to be a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia, ante,* p. 231 (MARSHALL, J., dissenting), I would grant certiorari in these cases and vacate the judgments insofar as they leave undisturbed the sentences of death.

No. 74–6717. ALFORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 307 So. 2d 433.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Petitioner contends that his right of confrontation, guaranteed by the Sixth and Fourteenth Amendments, was violated because the transcript of the preliminary hearing testimony of a material prosecution witness was read at his trial and the prosecution, although it was aware that the witness would leave Florida prior to the trial, failed to use available procedures to assure the witness' presence at trial or to depose the witness before the trial began. See *Barber* v. *Page,* 390 U. S. 719 (1968). On the record in this case, we would grant certiorari and set the case for oral argument.

In any event, the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia, ante,* p. 227 (BRENNAN, J., dissenting); *id.,* p. 231 (MARSHALL, J., dissenting). We would therefore grant certiorari and vacate the judgment in this case insofar as it leaves undisturbed the death sentence imposed.

No. 75–927. HOGGE ET AL. *v.* JOHNSON, CITY MANAGER OF HAMPTON, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari and, as in *Colorado Springs Amusements, Ltd.* v. *Rizzo, infra,* this page, remand case for determination of petitioners' constitutional contentions giving appropriate, but not necessarily conclusive, weight to our summary dispositions. Reported below: 526 F. 2d 833.

No. 75–999. COLORADO SPRINGS AMUSEMENTS, LTD., T/A VELVET TOUCH, ET AL. *v.* RIZZO, MAYOR OF PHILADELPHIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 571.

MR. JUSTICE BRENNAN, dissenting.

We depreciate the precedential weight of summary dispositions in our decisional process, expressly holding in *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974), that such dispositions "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." I would not require district courts, courts of appeals, and state courts to ascribe any greater precedential weight to summary dispositions than this Court does. Accordingly, I did not join the holding in *Hicks* v. *Miranda,* 422 U. S. 332, 344–345 (1975), that "the lower courts are bound by summary decisions by this Court," which requires state and lower federal courts to treat our summary dispositions of appeals as conclusive precedents regarding constitutional challenges to like state statutes or ordinances.

The Court of Appeals in this case conscientiously followed the procedure mandated by *Hicks.* Faced with a claim that three appeals from state courts that had been dismissed by this Court "for want of a substantial federal question" compelled rejection of petitioners' contentions that the Philadelphia ordinance in question violated the

Federal Constitution,[1] the Court of Appeals compared in detail the constitutional issues presented here and those presented in the jurisdictional statements filed in this Court in the three earlier cases. 524 F. 2d 571, 576. *Hicks, supra,* at 345 n. 14, makes such analysis obligatory as a condition to reliance on a summary disposition.[2] Completion of this process satisfied the Court of Appeals that one or more of the earlier jurisdictional statements had presented to this Court constitutional claims addressed to massage parlor ordinances, like those addressed by petitioners to the Philadelphia ordinance, "based upon equal, but reprehensible, treatment of both sexes; an invidiously discriminatory sex-based classification; an irrational exception in the ordinance for massage treatments given under the direction of a medical practitioner; unreasonable abridgement of the right to pursue a legitimate livelihood; and the irrebuttable presumption doctrine." 524 F. 2d, at 576 (footnotes omitted). Accordingly, the Court of Appeals, without expressing its own views of the merits of the constitutional contentions, but in compliance with the holding of *Hicks,* decided the constitutional questions adversely to petitioners solely and squarely upon the authority of *Smith* v. *Keator,* 419

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[1] Although *Hicks* and the instant case involve the precedential effect of dismissals for want of a substantial federal question, the same principles apply to summary affirmances. See *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974). These principles, of course, have no applicability to other forms of summary action, such as dismissals for want of jurisdiction or for want of a properly presented federal question.

[2] See *Cantor* v. *Detroit Edison Co., ante,* at 617–618, n. 5 (STEWART, J., dissenting). I recognize that *Hicks* was not the first opinion of this Court that noted the precedential effect of certain summary dispositions. But some have viewed *Hicks* as clarifying this question, and for convenience I shall refer to this principle as the *Hicks* rule.

U. S. 1043 (1974), dismissing for want of a substantial federal question 285 N. C. 530, 206 S. E. 2d 203; *Rubenstein* v. *Township of Cherry Hill,* 417 U. S. 963 (1974), dismissing for want of a substantial federal question No. 10,027 (N. J. Sup. Ct., Jan. 29, 1974) (unreported); and *Kisley* v. *City of Falls Church,* 409 U. S. 907 (1972), dismissing for want of a substantial federal question 212 Va. 693, 187 S. E. 2d 168.

It may be that the Court of Appeals would have reached the same result in a full and reasoned opinion addressed to the merits of the several constitutional contentions. But we do not know, because the Court of Appeals carefully concealed its views on the premise that *Hicks* precluded such expression in holding that state and lower federal courts are conclusively bound by summary dispositions. That premise was also accepted by the Court of Appeals for the Fourth Circuit in a case also involving an attack on the constitutionality of a massage parlor ordinance; there the Court of Appeals believed that a substantial federal question deserving elaboration was presented, but read *Hicks* as foreclosing such elaboration. *Hogge* v. *Johnson,* 526 F. 2d 833 (1975).

A panel of the Court of Appeals for the Seventh Circuit recently faced the same dilemma in *Sidle* v. *Majors,* 536 F. 2d 1156 (1976). Appellant in that case challenged the Indiana guest statute on equal protection grounds. After discussing the relevant factors, the court stated that "we consider the foregoing considerations to be persuasive that this guest statute contravenes the Equal Protection Clause." *Id.,* at 1158. The court noted a decision to the contrary, *Silver* v. *Silver,* 280 U. S. 117 (1929), but concluded that later equal protection cases had left the premises of that decision no longer valid. 536 F. 2d, at 1159. The court also cited

eight State Supreme Court decisions invalidating guest statutes on equal protection grounds.[3] Thus, the court held: "We can find no necessary rational relation to a legitimate state interest (*Reed* v. *Reed*, 404 U. S. 71, 75–76 [1971]) that would require us to sustain the legislation." *Ibid.* Nevertheless, the court considered itself bound by *Cannon* v. *Oviatt*, 419 U. S. 810 (1974), dismissing for want of a substantial federal question 520 P. 2d 883 (Utah), and it therefore rejected the equal protection argument. Finally, because the court was the first Federal Court of Appeals to consider this issue and there was a severe conflict of authority among the state courts, see n. 4, *infra*, the court remarked:

> "The frequency with which the question has arisen and the disagreement among the courts attest to the importance of the issue, its difficulty and the need for conclusive resolution so that the present viability of *Silver* v. *Silver* can be authoritatively determined." 536 F. 2d, at 1160.

Clearly, then, the same reasons that lead us to deny conclusive precedential value in this Court to our summary dispositions require that we allow the same latitude to state and lower federal courts. We accord summary dispositions less precedential value than dispositions by opinion after full briefing and oral argument, because jurisdictional statements, and motions to affirm or dismiss addressed to them, rarely contain more

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[3] *Brown* v. *Merlo*, 8 Cal. 3d 855, 506 P. 2d 212 (1973); *Thompson* v. *Hagan*, 96 Idaho 19, 523 P. 2d 1365 (1974); *Henry* v. *Bauder*, 213 Kan. 751, 518 P. 2d 362 (1974); *Manistee Bank* v. *McGowan*, 394 Mich. 655, 232 N. W. 2d 636 (1975); *Laakonen* v. *Eighth Jud. Dist. Court*, 538 P. 2d 574 (Nev. 1975); *McGeehan* v. *Bunch*, 88 N. M. 308, 540 P. 2d 238 (1975); *Johnson* v. *Hassett*, 217 N. W. 2d 771 (N. D. 1974); *Primes* v. *Tyler*, 43 Ohio St. 2d 195, 331 N. E. 2d 723 (1975).

than brief discussions of the issues presented—certainly not the full argument we expect in briefs where plenary hearing is granted. And, of course, neither the statements nor the motions are argued orally. Actually, the function of the jurisdictional statement and motion to dismiss or affirm is very limited: It is to apprise the Court of issues believed by the appellant to warrant, and by the appellee not to warrant, this Court's plenary review and decision. Thus each paper is addressed to its particular objective in that regard and eschews any extended treatment of the merits. The appellant often concentrates on trying to persuade us that the appealed decision conflicts with the decision of another court and that the conflict requires our resolution. The motions to dismiss or affirm will try to persuade us to the contrary. This treatment is fully in compliance with our Rules, which call for discussion of whether "the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument," and not for treatment of the merits. This Court's Rules 15 (1)(e), (f), 16 (1). Thus, the nature of materials before us when we vote summarily to dispose of a case rarely suffices as a basis for regarding the summary disposition as a conclusive resolution of an important constitutional question, and we therefore do not treat it as such. For the same reason we should not require that the district courts, courts of appeals, and state courts do so.

There is reason for concern that *Hicks* will impair this Court's ability—indeed, responsibility—to adjudicate important constitutional issues. Where a state appellate court rejects a novel federal constitutional challenge, and simultaneously rejects a similar state-law challenge, a dismissal for want of a substantial federal question will definitively resolve that issue of federal law for all courts in this country, as would a summary affirmance from a federal court. Resolution of important issues, in my

view, ought not be made solely on the basis of a single jurisdictional statement, without the benefit of other court decisions and the helpful commentary that follows significant developments in the law. One factor that affects the exercise of our discretionary jurisdiction is a desire to let some complex and significant issues be considered by several courts before granting certiorari. Although this discretionary factor cannot be given weight as to cases on our appellate docket, the effect of *Hicks*, as I have said, is to prevent this Court from obtaining the views of state and lower federal courts on important issues; after dismissal for want of a substantial federal question or summary affirmance of the first case raising a particular constitutional question, no court will again consider the merits of the question presented to this Court. This consequence will be especially unfortunate in the instances in which the first appellants to get to this Court do a poor job of advocacy, which may prevent the Court from appreciating the true significance of the case. Furthermore, although *Hicks* does not prevent this Court from disregarding its summary dispositions, the binding effect of such dispositions on state and lower federal courts will cause issues to be presented to this Court in future cases without a fully developed record addressed to the merits of the specific case. This effect seriously diminishes our ability to reconsider issues previously disposed of summarily.[4]

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[4] A further anomaly is that we may have denied certiorari in state and federal cases dealing with a specific issue where the decisions below reach inconsistent results, but these conflicts are then resolved merely by dismissing a single appeal from a state-court decision. This, in my view, is both an unwise and unseemly administration of justice.

Moreover, of the eight state cases invalidating guest statutes cited by the Seventh Circuit in *Sidle*, see n. 3, *supra*, six were based on federal and state grounds, while two were based solely on state

Moreover, summary dispositions are rarely supported even by a brief opinion identifying the federal questions presented or stating the reasons or authority upon which the disposition rests. A mere "affirmed" or "dismissed for want of a substantial federal question" appears on the order list announcing the disposition, even in cases some of us believe present major constitutional issues. See, *e. g.*, *Doe* v. *Commonwealth's Attorney*, 425 U. S. 901 (1976) (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting); *Ringgold* v. *Borough of Collingswood*, 426 U. S. 901 (1976) (BRENNAN, MARSHALL, and BLACKMUN, JJ., dissenting). When presented with the contention that our unexplained dispositions are conclusively binding, puzzled state and lower court judges are left to guess as to the meaning and scope of our unexplained dispositions. We ourselves have acknowledged that summary dispositions are "somewhat opaque," *Gibson* v. *Berryhill*, 411 U. S. 564, 576 (1973), and we cannot deny that they have sown confusion.[5]

It is no answer that a careful examination of the jurisdictional statements in prior cases—a task required by *Hicks* and fully performed by the Court of Appeals in

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law. We therefore had no jurisdiction to review these decisions. *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940). On the other hand, the *Sidle* court also cited seven state decisions upholding guest statutes, all of which necessarily reject both the state and federal claims. One of these cases was appealed to this Court, and we dismissed the appeal. And now, simply because we declined to review the only one of these 15 cases to come to this Court, an obviously substantial federal question is to be deemed foreclosed. See *supra*, at 915.

[5] One striking example is the diverse reading of our summary affirmance in *McInnis* v. *Ogilvie*, 394 U. S. 322 (1969), discussed at length in Note, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, 52 B. U. L. Rev. 373, 381–391 (1972).

this case—will resolve the ambiguity. As long as we give no explanation of the grounds supporting our summary disposition, such examination cannot disclose, for example, that there is no rationale accepted by a majority of the Court. Plainly, six Members of the Court may vote to dismiss or affirm an appeal without any agreement on a rationale. It is precisely in these areas of the law, however, that there probably is the greatest need for this Court to clarify the law.

In addition, there will always be the puzzling problem of how to deal with cases that are similar, but not identical, to some case that has been summarily disposed of in this Court. Courts should, of course, not feel bound to treat a summary disposition as binding beyond those situations in which the issues are the same. *Hicks* v. *Miranda*, 422 U. S., at 345 n. 14.[6] But there is a significant risk that some courts may try to resolve the ambiguity inherent in summary dispositions by attaching too much weight to dicta or overbroad language contained in opinions from which appeals were taken and resolved summarily in this Court. THE CHIEF JUSTICE has noted that "[w]hen we summarily affirm, without opinion, the judgment of a three-judge district court we affirm the

[6] In some instances, lower courts have clearly carried *Hicks* too far. The Court of Appeals for the Fifth Circuit recently rejected the claim that a city ordinance requiring municipal employees to live within the city violated the employees' constitutional right to travel. *Wright* v. *City of Jackson*, 506 F. 2d 900 (1975). The Court of Appeals relied solely on this Court's dismissal for want of a substantial federal question of an appeal concerning a similar ordinance. *Id.*, at 902. But, as recognized in *McCarthy* v. *Philadelphia Civ. Serv. Comm'n*, 424 U. S. 645 (1976), that dismissal could not be relied upon for this purpose, since the right-to-travel argument had not been considered by the state court and had not been raised in the jurisdictional statement in this Court. The same error was made in *Ahern* v. *Murphy*, 457 F. 2d 363 (CA7 1972).

judgment but not necessarily the reasoning by which it was reached." *Fusari* v. *Steinberg*, 419 U. S. 379, 391 (1975) (concurring opinion). The same principle obviously applies to dismissals for want of a substantial federal question. Moreover, it ought to be clear to state and lower federal courts that principles set forth in full opinions cannot be limited merely by a summary disposition; a summary disposition "settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." *Id.*, at 392. See also *Edelman* v. *Jordan*, 415 U. S., at 671.

Further ambiguity is created by the Court's practice of summarily affirming only in federal cases and dismissing for want of a substantial federal question only in state cases—a practice that, I confess, I have accepted uncritically for nearly 20 years. When we summarily affirm in an appeal from a three-judge district court, we necessarily hold that a three-judge court was required; otherwise, we would be without jurisdiction under 28 U. S. C. § 1253. This affirmance, then, encompasses a holding that there was a "substantial federal question" requiring convening of a three-judge court under 28 U. S. C. § 2281. Yet, we would "dismiss for want of a substantial federal question" an appeal from a state appellate court raising the identical issue. The language used to dispose of appeals in state cases is clearly misleading; the Court may be saying either that the federal question is insufficiently substantial to support jurisdiction *or* that a substantial federal question was correctly decided and that this conclusion will not be affected by full briefing and oral argument. Even these alternatives are not mutually exclusive, however, since the six or more Members of the Court voting to dismiss might not agree in a particular case; at least where a majority of the Court votes to dismiss on the latter ground, we ought

not create still more confusion by dismissing for want of a substantial federal question. As two leading commentators on the Court's practice have noted:

> "When the Court feels that the decision below is correct and that no substantial question on the merits has been raised, it will affirm an appeal from a federal court, but will dismiss an appeal from a state court 'for want of a substantial federal question.' Only history would seem to justify this distinction; it would appear more sensible to affirm appeals from both state and federal courts when the reason for the summary disposition is that the decision below is correct." R. Stern & E. Gressman, Supreme Court Practice 233 (4th ed. 1969).

Even if the Court rejects my view that *Hicks* should be modified, at a minimum we have the duty to provide some explanation of the issues presented in the case and the reasons and authorities supporting our summary dispositions. This surely should be the practice in cases presenting novel issues or where there is a disagreement among us as to the grounds of the disposition, and I think it should be the practice in every case. In addition, we ought to distinguish in our dispositions of appeals from state courts between those grounded on the insubstantiality of the federal questions presented and those grounded on agreement with the state court's decision of substantial federal questions. Our own self-interest should counsel these changes in practice. After *Hicks* we necessarily are under pressure to grant plenary review of state and lower federal court decisions, such as this case and *Hogge*, that rest exclusively on our unexplained summary dispositions. For since *Hicks* forecloses future plenary review of the issues in the state and lower federal courts, the issues will never have plenary review if not afforded here.

I would grant the petition for certiorari and remand the case to the Court of Appeals for determination of petitioner's constitutional contentions giving appropriate, but not necessarily conclusive, weight to our summary dispositions.

No. 75–1238. PENNSYLVANIA *v.* MARTIN. Sup. Ct. Pa. Motion for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 465 Pa. 134, 348 A. 2d 391.

No. 75–1482. GEISHA HOUSE, INC. *v.* CULLINANE, CHIEF, D. C. POLICE DEPARTMENT, ET AL. Ct. App. D. C. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari and, as in *Colorado Springs Amusements, Ltd.* v. *Rizzo, supra,* remand case for determination of petitioner's constitutional contentions giving appropriate, but not necessarily conclusive, weight to our summary dispositions. Reported below: 354 A. 2d 515.

No. 75–6112. HART ET AL. *v.* UNITED STATES; and DIXON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 525 F. 2d 1199 (first case); 525 F. 2d 1201 (second case).

No. 75–6596. ALVORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 322 So. 2d 533.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Petitioner contends that he was unconstitutionally convicted because a statement he made during in-custody interrogation was admitted in evidence during the prosecution's case-in-chief, despite the absence of any warning to petitioner that if he could not afford an attorney one would be appointed to represent him before questioning. See *Miranda* v. *Arizona,* 384 U. S. 436 (1966). On the

record in this case, we would grant certiorari and set the case for oral argument.

In any event, the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia, ante,* at 227 (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). We would therefore grant certiorari and vacate the judgment in this case insofar as it leaves undisturbed the death sentence imposed.

## STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1973, 1974, AND 1975

| | ORIGINAL | | | APPELLATE | | | MISCELLANEOUS | | | TOTALS | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Terms | 1973 | 1974 | 1975 | 1973 | 1974 | 1975 | 1973 | 1974 | 1975 | 1973 | 1974 | 1975 |
| Number of cases on dockets | 14 | 12 | 14 | 2,480 | 2,308 | 2,352 | 2,585 | 2,348 | 2,395 | 5,079 | 4,668 | 4,761 |
| Number disposed of during terms | 4 | 4 | 7 | 1,868 | 1,877 | 1,810 | 2,004 | 1,966 | 1,989 | 3,876 | 3,847 | 3,806 |
| Number remaining on dockets | 10 | 8 | 7 | 612 | 431 | 542 | 581 | 382 | 406 | 1,203 | 821 | 955 |

| | TERMS | | |
|---|---|---|---|
| | 1973 | 1974 | 1975 |
| Cases argued during term | 170 | 175 | 179 |
| Number disposed of by full opinions | 161 | 144 | 160 |
| Number disposed of by per curiam opinions | 8 | 20 | 16 |
| Number set for reargument | 1 | 11 | 3 |
| Cases granted review this term | 183 | 172 | 172 |
| Cases reviewed and decided without oral argument | 188 | 157 | 186 |
| Total cases to be available for argument at outset of following term | 89 | 100 | 99 |



JULY 6, 1976

# INDEX

**ABORTIONS.** See also **Abstention; Appeals; Constitutional Law, I, 1–6; Standing to Sue.**

*Definition of "viability"—Flexibility.*—Definition of "viability" in § 2 (2) of Missouri abortion statute as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems" does not conflict with definition in *Roe* v. *Wade*, 410 U. S. 113, 160, 163, as point at which fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and is presumably capable of "meaningful life outside the mother's womb." Section 2 (2) maintains flexibility of term "viability" recognized in *Roe*. It is not a proper legislative or judicial function to fix viability, which is essentially for judgment of responsible attending physician, at a specific point in gestation period. Planned Parenthood of Missouri v. Danforth, p. 52.

**ABSTENTION.**

*District Court—Constitutionality of state abortion statute.*—In class action claiming that Massachusetts statute governing type of consent, including parental consent, required before an abortion may be performed on an unmarried woman under age of 18, violates Due Process and Equal Protection Clauses of Fourteenth Amendment, District Court should have abstained from deciding constitutional issue and should have certified to Massachusetts Supreme Judicial Court appropriate questions concerning meaning of statute and procedure it imposes. Bellotti v. Baird, p. 132.

**ACTIONS FOR VIOLATIONS OF COLLECTIVE-BARGAINING AGREEMENTS.** See **Labor.**

**ADMISSIBILITY OF ILLEGALLY SEIZED EVIDENCE.** See **Evidence; Habeas Corpus.**

**AGGRAVATING CIRCUMSTANCES OR FACTORS.** See **Constitutional Law, II, 1, 2, 5.**

**ALIENS.** See **Constitutional Law, III, 1, 2; Criminal Law.**

**ANTITRUST ACTS.**

*Electric utility—Light-bulb exchange program—State approval—Implied exemption from antitrust laws.*—Neither Michigan's approval

**ANTITRUST ACTS**—Continued.

of respondent private electric utility's present tariff nor fact that light-bulb exchange program whereby respondent furnishes its residential customers, without additional charge, with almost 50% of standard-size light bulbs, may not be terminated until a new tariff is filed, is sufficient basis for implying an exemption from federal antitrust laws for that program. Cantor v. Detroit Edison Co., p. 579.

**APPEALS.**

*Court of Appeals—Constitutionality of state statute—Merits of case—Lack of answer or other pleading on merits.*—In respondent physicians' action against petitioner state official challenging constitutionality of Missouri statute excluding abortions that are not "medically indicated" from purposes for which Medicaid benefits are available to needy persons, Court of Appeals, on appeal from District Court's dismissal of case for lack of standing, should not have proceeded to resolve merits of case in respondents' favor, since petitioner, who has not filed an answer or other pleading addressed to merits, has not had opportunity to present evidence or legal arguments in defense of statute. Singleton v. Wulff, p. 106.

**ARBITRABLE GRIEVANCES.** See **Labor.**

**AUTOMATIC DEATH SENTENCES.** See **Constitutional Law,** II, 3, 4.

**AUTOMATIC REVIEW OF DEATH SENTENCES.** See **Constitutional Law,** II, 2.

**AUTOMOBILE SEARCHES.** See **Constitutional Law,** III, 3.

**BIFURCATED TRIALS.** See **Constitutional Law,** II, 1, 2, 5.

**BLACK LUNG BENEFITS ACT OF 1972.** See **Constitutional Law,** I, 7; **Procedure.**

**BORDER PATROL.** See **Constitutional Law,** III, 1, 2; **Criminal Law.**

**CAPITAL PUNISHMENT.** See **Constitutional Law,** II.

**CASE OR CONTROVERSY.** See **Standing to Sue.**

**CHECKPOINTS.** See **Constitutional Law,** III, 1, 2; **Criminal Law.**

**COAL MINERS.** See **Constitutional Law,** I, 7.

**COLLECTIVE-BARGAINING AGREEMENTS.** See **Labor.**

**CONSENT TO ABORTION.** See **Abstention; Constitutional Law,** I, 1–6.

**CONSTITUTIONAL LAW.** See also **Abstention; Appeals; Procedure; Standing to Sue.**

**I. Due Process.**

1. *Abortions—Physician's criminal and civil liability for death of child.*—First sentence of § 6 (1) of Missouri abortion statute, requiring physician to exercise professional care to preserve fetus' life and health during abortion, impermissibly requires a physician to preserve *fetus'* life and health, whatever the stage of pregnancy. Second sentence, which provides for criminal and civil liability where a physician fails "to take such measures to encourage or to sustain life of the *child,* and the death of the *child* results," does not alter duty imposed by first sentence or limit that duty to pregnancies that have reached stage of viability, and since it is inseparably tied to first provision, whole section is invalid. Planned Parenthood of Missouri v. Danforth, p. 52.

2. *Abortions—Prohibition of certain procedure.*—Through § 9 of Missouri abortion statute, prohibiting after first 12 weeks of pregnancy abortion procedure of saline amniocentesis as "deleterious to maternal health," State would prohibit most commonly used abortion procedure in country and one that is safer, with respect to maternal mortality, than even continuation of pregnancy until normal childbirth and would force pregnancy terminations by methods more dangerous to woman's health than method outlawed. As so viewed outright legislative proscription of saline amniocentesis fails as a reasonable protection of maternal health. As an arbitrary regulation designed to prevent vast majority of abortions after first 12 weeks, it is plainly unconstitutional. Planned Parenthood of Missouri v. Danforth, p. 52.

3. *Abortions—Reporting and recordkeeping requirements.*—Sections 10 and 11 of Missouri abortion statute, prescribing reporting and recordkeeping requirements for health facilities and physicians performing abortions, which requirements can be useful to State's interest in protecting health of its female citizens and may be of medical value, are not constitutionally offensive in themselves, particularly in view of reasonable confidentiality and retention provisions. They thus do not interfere with abortion decision or physician-patient relationship. Planned Parenthood of Missouri v. Danforth, p. 52.

4. *Abortions—Requiring spousal consent.*—Section 3 (3) of Missouri abortion statute requiring, for first 12 weeks of pregnancy, written consent of spouse of a woman seeking abortion unless licensed physician certifies that abortion is necessary to preserve mother's life, which provision does not comport with standards enunciated

**CONSTITUTIONAL LAW**—Continued.

in *Roe* v. *Wade*, 410 U. S. 113, 164–165, is unconstitutional, since State cannot "delegate to a spouse a veto power which the [S]tate itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." Planned Parenthood of Missouri v. Danforth, p. 52.

5. *Abortions—Requiring woman's consent.*—Section 3 (2) of Missouri abortion statute requiring that before submitting to an abortion during first 12 weeks of pregnancy a woman must consent in writing to procedure and certify that "her consent is informed and freely given and is not the result of coercion," is not unconstitutional. Decision to abort is important and often stressful, and awareness of decision and its significance may be constitutionally assured by State to extent of requiring woman's prior written consent. Planned Parenthood of Missouri v. Danforth, p. 52.

6. *Abortions—Unmarried minor—Requiring parental consent.*—State may not constitutionally impose a blanket parental consent requirement, such as § 3 (4) of Missouri abortion statute does, as a condition for an unmarried minor's abortion during first 12 weeks of her pregnancy for substantially same reasons as in case of spousal consent provision, there being no significant state interest, whether to safeguard family unit and parental authority or otherwise, in conditioning an abortion on consent of a parent with respect to under-18-year-old pregnant minor. As stressed in *Roe* v. *Wade*, 410 U. S. 113, 164, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." Planned Parenthood of Missouri v. Danforth, p. 52.

7. *Federal Coal Mine Health and Safety Act of 1969.*—Challenged provisions of Title IV of Federal Coal Mine Health and Safety Act of 1969, as amended by Black Lung Benefits Act of 1972, requiring "black lung" (pneumoconiosis) benefit payments with respect to miners who left mine employment before effective date of amended Act, and containing certain definitions, presumptions, and limitations on rebuttal evidence against benefit claims, do not violate Due Process Clause of Fifth Amendment. Usery v. Turner Elkhorn Mining Co., p. 1.

**II. Eighth Amendment.**

1. *Death sentence for murder—Cruel and unusual punishment—Florida statute.*—Florida Supreme Court's judgment upholding death sentence for murder imposed pursuant to Florida statute requiring trial judge as sentencing authority to weigh eight statutory aggravating factors against seven statutory mitigating factors to determine whether death penalty should be imposed, is affirmed against chal-

**CONSTITUTIONAL LAW**—Continued.

lenges death sentence violates Eighth and Fourteenth Amendments. Proffitt v. Florida, p. 242.

2. *Death sentence for murder—Cruel and unusual punishment—Georgia statute.*—Georgia Supreme Court's judgment upholding death sentences for murder imposed pursuant to Georgia's statutory bifurcated procedure providing jury as sentencing authority with information relevant to imposing death sentence and with standards to guide its use of such information, and further providing for automatic review of all death sentences by Georgia Supreme Court, is affirmed against challenges that imposition of death sentences constitutes "cruel and unusual" punishment under Eighth and Fourteenth Amendments. Gregg v. Georgia, p. 153.

3. *Death sentence for murder—Cruel and unusual punishment—Louisiana statute.*—Louisiana Supreme Court's judgment upholding death sentence for first-degree murder imposed pursuant to Louisiana statute making death penalty mandatory for that crime, and challenged as violating Eighth and Fourteenth Amendments, is reversed and case is remanded. Roberts v. Louisiana, p. 325.

4. *Death sentence for murder—Cruel and unusual punishment—North Carolina statute.*—North Carolina Supreme Court's judgment upholding death sentence for first-degree murder imposed pursuant to North Carolina statute making death penalty mandatory for that crime, and challenged as violating Eighth and Fourteenth Amendments, is reversed and case is remanded. Woodson v. North Carolina, p. 280.

5. *Death sentence for murder—Cruel and unusual punishment—Texas statute.*—Texas Court of Criminal Appeals' judgment upholding death sentence for murder imposed pursuant to Texas statute requiring jury to find existence of a statutory aggravating circumstance before death sentence may be imposed, is affirmed against challenge that death sentence violates Eighth and Fourteenth Amendments. Jurek v. Texas, p. 262.

**III. Fourth Amendment.**

1. *Search and seizure—Border Patrol—Fixed checkpoint—Necessity for warrant.*—Operation of a fixed checkpoint by Border Patrol need not be authorized in advance by a judicial warrant. Visible manifestation of field officers' authority at a checkpoint provides assurances to motorists that officers are acting lawfully. Moreover, purpose of a warrant in preventing hindsight from coloring evaluation of reasonableness of a search or seizure is inapplicable here, since reasonableness of checkpoint stops turns on factors such as checkpoint's location and method of operation. These factors are

**CONSTITUTIONAL LAW**—Continued.

not susceptible of distortion of hindsight, and will be open to post-stop review notwithstanding absence of a warrant. Nor is purpose of a warrant in substituting a magistrate's judgment for that of searching or seizing officer applicable, since need for this is reduced when decision to "seize" is not entirely in hands of field officer and deference is to be given to administrative decisions of higher ranking officials in selecting checkpoint locations. United States v. Martinez-Fuerte, p. 543.

2. *Search and seizure—Border Patrol's stopping of vehicle—Permanent checkpoint.*—Border Patrol's routine stopping of a vehicle at a permanent checkpoint located on a major highway away from Mexican border for brief questioning of vehicle's occupants is consistent with Fourth Amendment, and stops and questioning may be made at reasonably located checkpoints in absence of any individualized suspicion that particular vehicle contains illegal aliens. United States v. Martinez-Fuerte, p. 543.

3. *Search and seizure—Warrantless inventory search of impounded automobile.*—Procedures whereby police discovered marihuana in glove compartment of respondent's car while conducting a warrantless inventory search of car which had been impounded for parking violations, did not involve an "unreasonable" search in violation of Fourth Amendment. South Dakota v. Opperman, p. 364.

**COURT-MADE EXCLUSIONARY RULE.** See **Evidence; Habeas Corpus.**

**COURTS OF APPEALS.** See **Appeals.**

**CRIMINAL LAW.** See **Constitutional Law,** II, III; **Habeas Corpus.**

**CRUEL AND UNUSUAL PUNISHMENT.** See **Constitutional Law,** II.

**DEATH OR DISABILITY BENEFITS FOR COAL MINERS.** See **Constitutional Law,** I, 7.

**DEATH SENTENCES.** See **Constitutional Law,** II.

**DEFINITION OF "VIABILITY."** See **Abortions.**

**DETERRENCE OF UNLAWFUL POLICE CONDUCT.** See **Evidence; Habeas Corpus.**

**DISTRICT COURTS.** See **Abstention; Labor; Procedure.**

**DUE PROCESS.** See **Constitutional Law,** I.

**EIGHTH AMENDMENT.** See **Constitutional Law,** II.

**ELECTRIC UTILITIES.** See **Antitrust Acts.**

**EVIDENCE.** See also **Habeas Corpus.**

*Exclusionary rule—Evidence illegally seized by state agent—Admissibility in federal civil proceeding.*—Judicially created exclusionary rule should not be extended to forbid use in civil proceeding of one sovereign (here Federal Government) of evidence illegally seized by a criminal law enforcement agent of another sovereign (here state government), since likelihood of deterring law enforcement conduct through such a rule is not sufficient to outweigh societal costs imposed by exclusion. United States v. Janis, p. 433.

**"EXCESSIVE" PUNISHMENT.** See **Constitutional Law,** II, 2.

**EXCLUSIONARY RULE.** See **Evidence; Habeas Corpus.**

**EXEMPTIONS FROM ANTITRUST LAWS.** See **Antitrust Acts.**

**EXPECTATION OF PRIVACY.** See **Constitutional Law,** III, 3.

**EXTENUATING CIRCUMSTANCES OR FACTORS.** See **Constitutional Law,** II, 1, 2, 5.

**FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969.** See **Constitutional Law,** I, 7; **Procedure.**

**FEDERAL-STATE RELATIONS.** See **Evidence; Habeas Corpus.**

**FELONY MURDER.** See **Constitutional Law,** II, 1, 2.

**FIFTH AMENDMENT.** See **Constitutional Law,** I, 7.

**FIRST-DEGREE MURDER.** See **Constitutional Law,** II, 1, 3, 4.

**FIXED CHECKPOINTS.** See **Constitutional Law,** III, 1, 2.

**FLORIDA.** See **Constitutional Law,** II, 1.

**FOURTEENTH AMENDMENT.** See **Constitutional Law,** I, 1–6; II; III, 3.

**FOURTH AMENDMENT.** See **Constitutional Law,** III; **Criminal Law; Evidence; Habeas Corpus.**

**GEORGIA.** See **Constitutional Law,** II, 2.

**GUIDANCE IN IMPOSING DEATH SENTENCE.** See **Constitutional Law,** II, 1, 2, 5.

**HABEAS CORPUS.**

*State prisoner—Fourth Amendment claim—Opportunity for state litigation—Denial of federal relief.*—Where State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus

**HABEAS CORPUS**—Continued.
relief on ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. In this context contribution of exclusionary rule, if any, to effectuation of Fourth Amendment is minimal as compared to substantial societal costs of applying rule. Stone v. Powell, p. 465.

**HUSBAND'S CONSENT TO ABORTION.** See **Constitutional Law**, I, 1–6.

**ILLEGAL ALIENS.** See **Constitutional Law**, III, 1, 2; **Criminal Law.**

**ILLEGALLY SEIZED EVIDENCE.** See **Evidence; Habeas Corpus.**

**IMPLIED EXEMPTIONS FROM ANTITRUST LAWS.** See **Antitrust Acts.**

**IMPOUNDMENT OF AUTOMOBILES.** See **Constitutional Law.**

**INJUNCTIONS.** See **Labor.**

**INJURY IN FACT.** See **Standing to Sue**, 2.

**INVENTORY SEARCHES OF AUTOMOBILES.** See **Constitutional Law**, III, 3.

**IRREBUTTABLE PRESUMPTIONS.** See **Constitutional Law**, I, 7.

**JUDICIALLY CREATED EXCLUSIONARY RULE.** See **Evidence; Habeas Corpus.**

**JUDICIAL SENTENCING.** See **Constitutional Law**, II, 1.

**JUDICIAL WARRANTS.** See **Constitutional Law**, III, 1, 2.

**JURY'S DISCRETION IN IMPOSING DEATH SENTENCE.** See **Constitutional Law**, II, 2, 5.

**JURY'S RECOMMENDATION OF DEATH SENTENCE.** See **Constitutional Law**, II, 1.

**JUSTICIABILITY.** See **Standing to Sue.**

**LABOR.**

*Sympathy strike—Injunction—No-strike clause—Arbitrator's decision.*—District Court was not empowered to enjoin production and maintenance employees' sympathy strike in support of "office clerical-technical" employees' strike pending arbitrator's decision as to whether sympathy strike was forbidden by no-strike clause of collective-bargaining contracts between petitioner employer and respondent unions. Buffalo Forge Co. v. Steelworkers, p. 397.

**LABOR MANAGEMENT RELATIONS ACT.** See **Labor.**

**LIGHT-BULB EXCHANGE PROGRAM.** See **Antitrust Acts.**

**LOUISIANA.** See **Constitutional Law,** II, 3.

**MANDATORY DEATH SENTENCES.** See **Constitutional Law,** II, 3, 4.

**MASSACHUSETTS.** See **Abstention.**

**MEDICAID BENEFITS.** See **Appeals; Standing to Sue,** 2.

**MEXICAN ALIENS.** See **Constitutional Law,** III, 1, 2.

**MICHIGAN.** See **Antitrust Acts.**

**MISSOURI.** See **Abortions; Appeals; Constitutional Law,** I, 1–6; **Standing to Sue.**

**MITIGATING CIRCUMSTANCES OR FACTORS.** See **Constitutional Law,** II, 1, 2, 5.

**MURDER.** See **Constitutional Law,** II.

**NECESSITY FOR WARRANT TO OPERATE CHECKPOINT.** See **Constitutional Law,** III, 1, 2.

**NORRIS-LaGUARDIA ACT.** See **Labor.**

**NORTH CAROLINA.** See **Constitutional Law,** II, 4.

**NO-STRIKE CLAUSES.** See **Labor.**

**PARENTAL CONSENT TO ABORTION.** See **Abstention; Constitutional Law,** I, 1–6.

**PERMANENT CHECKPOINTS.** See **Constitutional Law,** III, 1, 2; **Criminal Law.**

**PHYSICIANS.** See **Appeals; Constitutional Law,** I, 1–6; **Standing to Sue.**

**PNEUMOCONIOSIS.** See **Constitutional Law,** I, 7.

**PRESUMPTIONS.** See **Constitutional Law,** I, 7.

**PRISONERS.** See **Habeas Corpus.**

**PRIVACY.** See **Constitutional Law,** III, 3.

**PRIVATE UTILITIES.** See **Antitrust Acts.**

**PROCEDURE.** See also **Abstention; Appeals.**

*District Court's rulings—Effect of Supreme Court's summary affirmance.*—This Court's summary affirmance in *National Independent Coal Operators Assn.* v. *Brennan,* 419 U. S. 955, did not foreclose District Court's determination of unconstitutionality regard-

**PROCEDURE**—Continued.

ing §§ 411 (c)(3) and (4) of Title IV of Federal Coal Mine Health and Safety Act of 1969, as amended by Black Lung Benefits Act of 1972, which issues were not before Court on that appeal. Usery v. Turner Elkhorn Mining Co., p. 1.

**REASONABLE SUSPICION FOR CHECKPOINT STOPS.** See **Constitutional Law**, III, 1, 2.

**REPORTING AND RECORDKEEPING OF ABORTIONS.** See **Constitutional Law**, I, 1–6.

**RESTRAINTS OF TRADE.** See **Antitrust Acts.**

**REVIEW OF DEATH SENTENCES.** See **Constitutional Law**, II, 1, 2.

**RIGHT OF PRIVACY.** See **Constitutional Law**, I, 1–6.

**ROUTINE CHECKPOINT STOPS.** See **Constitutional Law**, III, 1, 2.

**SALINE AMNIOCENTESIS.** See **Constitutional Law**, I, 1–6.

**SEARCHES AND SEIZURES.** See **Constitutional Law**, III; **Evidence**; **Habeas Corpus.**

**SENTENCING PROCEDURES.** See **Constitutional Law**, II.

**SHERMAN ACT.** See **Antitrust Acts.**

**SPOUSAL CONSENT TO ABORTION.** See **Constitutional Law**, I, 1–6.

**STANDING TO SUE.** See also **Appeals.**

1. *Physicians—Constitutionality of state abortion statute.*—Appellant Missouri-licensed physicians, one of whom performs abortions at hospitals and other of whom supervises abortions at Planned Parenthood, have standing to challenge constitutionality of certain provisions of Missouri abortion statute. Planned Parenthood of Missouri v. Danforth, p. 52.

2. *Physicians—Constitutionality of state statute excluding abortions from Medicaid.*—Respondent Missouri-licensed physicians had standing to maintain suit for injunctive relief and a declaration of unconstitutionality of a Missouri statute that excludes abortions that are not "medically indicated" from purposes for which Medicaid benefits are available to needy persons. Respondents alleged "injury in fact," *i. e.*, a sufficiently concrete interest in outcome of their suit to make it a case or controversy subject to District Court's Art. III jurisdiction. If respondents prevail in their suit to remove statutory limitation on reimbursable abortions, they will benefit by

**STANDING TO SUE**—Continued.
receiving payment for abortions and State will be out of pocket by amount of payments. Singleton v. Wulff, p. 106.

**STATE PRISONERS.** See **Habeas Corpus.**

**STOPPING OF VEHICLES AT CHECKPOINTS.** See **Constitutional Law,** III, 1, 2; **Criminal Law.**

**STRIKES.** See **Labor.**

**SUITS FOR VIOLATIONS OF COLLECTIVE-BARGAINING AGREEMENTS.** See **Labor.**

**SUMMARY AFFIRMANCES.** See **Procedure.**

**SUPREME COURT.** See also **Procedure.**
Appointment of Marshal, p. 901.

**SYMPATHY STRIKES.** See **Labor.**

**TEXAS.** See **Constitutional Law,** II, 5.

**UNLAWFULLY SEIZED EVIDENCE.** See **Evidence; Habeas Corpus.**

**UNMARRIED MINOR'S ABORTION.** See **Abstention; Constitutional Law,** I, 1–6.

**VALIDITY OF CAPITAL PUNISHMENT.** See **Constitutional Law,** II.

**VETO POWER OVER ABORTIONS.** See **Abstention; Constitutional Law,** I, 1–6.

**VIABILITY.** See **Abortions.**

**VIOLATIONS OF COLLECTIVE-BARGAINING AGREEMENTS.** See **Labor.**

**WARRANTLESS SEARCHES OF AUTOMOBILES** See **Constitutional Law,** III, 3.

**WARRANTS.** See **Constitutional Law,** III, 1, 2.

**WOMAN'S CONSENT TO ABORTION.** See **Constitutional Law,** I, 1–6.

**WORK STOPPAGES.** See **Labor.**

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